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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~763~~ 66

NORTHPORT POWER AND LIGHT COMPANY,
APPELLANT,

vs.

ROLAND H. HARTLEY, AS GOVERNOR OF THE STATE OF WASHINGTON, AND JOHN H. DUNBAR, AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED MARCH 26, 1930

(34,894)

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

No. 402. In Equity

NORTHPORT POWER AND LIGHT COMPANY, a Corporation, Plaintiff,

vs.

ROLAND H. HARTLEY, as Governor of the State of Washington, and John H. Dunbar, as Attorney General of the State of Washington, Defendants

BILL OF COMPLAINT—Filed Sept. 9, 1929

To the Honorable Judges of the District Court of the United States for the Western District of Washington, Southern Division, sitting in equity:

The Northport Power and Light Company, a corporation, organized and existing under the laws of the State of Washington, with its principal place of business at Northport, Stevens County, Washington and a citizen of said state, brings this bill against Roland H. Hartley as Governor of the State of Washington, and John H. Dunbar as attorney general of the State of Washington, citizens of the United States and the State of Washington, and residents of the Southern Division of the Western District of Washington.

And thereupon the plaintiff brings its complaint and shows unto Your Honors as follows:

I

That the plaintiff is a corporation organized and existing under the laws of the State of Washington, and has paid its last annual license fees due said state, and brings this bill against said Roland H. Hartley as governor of the State of Washington, and John H. Dunbar as the duly

elected, qualified and acting attorney general of the State of Washington.

[fol. 3]

II

That the value of the matters in dispute herein between the plaintiff and the defendants exceeds the sum of twenty-five thousand dollars ($25,000.00).

The jurisdiction of this Honorable Court is invoked because of and by reason of the Federal question involved in this suit and equity jurisdiction, and because plaintiff has no adequate remedy at law.

III

That the plaintiff is now, and ever since the year 1917 has been, the owner of certain right of way easements and franchises within the County of Stevens and State of Washington on which there has been constructed its transmission lines and power station for the purpose of conveying electrical energy from a point three miles north of the International Boundary Line in British Columbia, Canada to points seven or more miles distant in the County of Stevens, State of Washington.

That said right of way deed, easements and franchises are herein set forth as Exhibit I and made a part of this bill.

That all right of way easements and franchises are necessary for the purpose of transmitting said electrical energy in foreign commerce.

IV

That the plaintiff is incorporated under the laws of the State of Washington and its articles of incorporation are hereto attached as Exhibit 2, and made a part of this bill.

V

That the plaintiff is engaged in foreign commerce, in this that it purchases all of its electrical energy from the West Kootenay Power and Light Company, Ltd., a corporation of Canada, and transmits the same from a point at [fol. 4] and near Silica, British Columbia, Canada, some

three miles north of the International Boundary Line, over continuous transmission lines to consumers in the Town of Northport and other points in Stevens County, Washington and said electrical energy is purchased in Canada and sold and consumed in the United States.

VI

That the plaintiff now owns and holds a franchise from the town of Northport, Washington, authorizing it to sell and distribute electric current or energy to the inhabitants thereof, and it has at all times since 1917 been engaged and now is so engaged, and the electric current so sold and distributed is generated in the Dominion of Canada and transmitted across the International Boundary Line into the State of Washington for the purpose of such sale and distribution.

VII

That plaintiff is a domestic corporation of Washington, and the majority of its issued capital stock is owned by the West Kootenay Power and Light Company, Ltd. of Canada, an alien corporation.

That Article II, Section 33, of the State Constitution of Washington purports by its terms to prohibit the ownership of lands by aliens other than mineral and the necessary land for mills and machinery to be used in the development thereof and the manufacture of products therefrom, and states that for the purpose of inhibition that every corporation, the majority of whose capital stock is owned by aliens, shall be considered an alien for the purposes of the inhibition.

VIII

That there was enacted by the legislature of the State of Washington in the year 1921 an act entitled "An Act Relating to the Rights and Disabilities of Aliens With Respect to Lands, Providing for Forfeitures in Certain Cases, Prescribing Penalties, and Repealing Sections 135 and 136 of Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washing— and [fol. 5] Ballinger's Annotated Codes and Statutes of Washington", approved March 8, 1921.

IX

That the defendants, Roland H. Hartley as governor and John H. Dunbar as attorney general of the State of Washington, have threatened to and will wrongfully and illegally enfor-e said act in each *an* and all of its terms, and the whole thereof, against this plaintiff because of the fact that the majority of the capital stock of the plaintiff corporation is alien in ownership, and that the plaintiff corporation continues to operate its business in the customary and usual manner of utilizing easements and rights of way to land in the State of Washington, and will forfeit or attempt to forfeit all of said leasehold interests and franchises and the whole thereof and all the improvements thereon, and will attempt to escheat the same to the State of Washington, by the institution and prosecution of a suit at law in the Courts of Washington, as a result of which plaintiff will suffer great and irreparable loss and damage, and that plaintiff has no adequate remedy at law but is relievable only in a court of equity.

X

That said act of the legislature and said section of the Constitution of the State of Washington are in contravention of and repugnant to Clause 3, Section 8, Article I, of the United States Constitution relative to the regulation of commerce with foreign nations, and Section 10, Article I, of the United States Constitution providing that "no state shall * * * pass any law * * * impairing the obligation of contracts", and Section 1 of the Fourteenth Amendment to the United States Constitution relative to due process of law and equal protection to the rights of citizens; and the treaty of 1815 between the United States and Great Britain as extended by the treaty of 1827; and the threatened action of the attorney general, if executed, would be in violation of the aforesaid constitutional provisions, in that it would interfere with and destroy foreign commerce, would violate and render nugatory franchises granted to the plaintiff, and would deprive plaintiff, [fol. 6] — equal protection of the law, and would deprive it of its property without due process of law, and plaintiff also claims the protection of Section 3 relative to the dep-

rivation of property without due process of law, Section 12 relative to the prohibition of special privileges and immunities, and Section 23 relative to impairing the obligations of contracts, all said sections being embraced within and a part of Article 1 of the State Constitution of Washington, and the aforesaid treaty.

XI

That plaintiff is the owner of mining properties in the County of Stevens and as such owner is now engaged in the development of the same, and requires the use of electrical energy in the development of said properties, and plaintiff claims the protection of the proviso of Section 33, Article 2, of the State Constitution with regard to mineral lands and "necessary lands for mills and machinery to be used in the development thereof, and the manufacture of products therefrom" so long as it shall own and operate mining properties in the State of Washington and utilize said electrical energy in the development thereof, and the manufacture of products therefrom.

XII

That if plaintiff is not permitted to continue to own right of way easements over land and franchise to occupy highways, streets and alleys on which to construct transmission lines and sub-stations, it will be prohibited from engaging in foreign commerce and will suffer great and irreparable loss.

Plaintiff has no adequate remedy in the premises by the strict rules of law, and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and reliable, and to the end that plaintiff may have relief, which it can only obtain in a court of equity, it prays:

[fol. 7] 1. That Roland H. Hartley as governor of the State of Washington and John H. Dunbar as attorney general of the State of Washington be enjoined and restrained, provisionally, preliminarily and perpetually, by the order and injunction of this court from bringing, directly or indirectly, and permitting to be brought, directly or indirectly,

any proceedings at law or in equity for the purpose of enforcing said Section 33, Article II of the Constitution of the State of Washington and said act of the legislature of the State of Washington above mentioned, against this plaintiff so long as this plaintiff shall be engaged in the business of transmitting electrical energy in foreign commerce from a point in Canada to points in the State of Washington, and that an order to show cause issue herein upon application to the plaintiff herein directed to the above named defendants requiring them to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

2. That upon the hearing, the aforesaid section of the State Constitution and the aforesaid act passed by the legislature of the State of Washington be declared to be in contravention of and repugnant to Clause 3, Section 8, Article I, of the United States Constitution relative to foreign commerce, Section 10, Article I, of the United States Constitution providing that "no state shall * * * pass any law * * * impairing the obligation of contracts", and Section 1 of the Fourteenth Amendment to the United States Constitution relative to due process of law and equal protection to the rights of citizens thereto, and that a perpetual injunction be issued restraining the enforcement thereof as hereinbefore prayed for.

[fol. 8] 3. That a writ of subpœna may issue to the defendant requiring him to answer this bill of complaint fully and truthfully, but not on oath, an oath hereby being waived, and that further and general relief be granted as the nature of the plaintiff's case may require or to equity may seem meet.

W. Lon Johnson, O. C. Moore, Attorneys for Plaintiff.

Duly sworn to by C. B. Smith. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 9] EXHIBIT 1 TO BILL OF COMPLAINT

39288

Right of Way Deed

This indenture made the twenty-fourth day of September, A. D. 1917, between Chris Knutson, a single man, of the state of Washington, hereinafter called the Grantor, of the first part, and the Northport Power and Light Company, a corporation organized existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Sixty-two Dollars and fifty cents ($62.50), paid by said Grantee to said Grantor, the receipt whereof is hereby acknowledged, the Grantor does hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the north boundary of Lot 15, in Section 3, Twp. 40 N., Range 39 E. W. M., 479 feet east of the northwest corner of said Lot 15.

Thence S. 26 degrees 15' E. 471.8 feet as surveyed through Lots 15 and 9 of said Sec. 3, to a point on the south line of said Lot 9, 1,130 feet east of the southwest corner of Lot 9, with a strip of land forty-nine and one-half feet in width on both sides of the line so described, containing 3.34 acres more or less.

It is the intention of this deed to convey the above said strip of land through the Great Republic Mining lodge and the Southern Cross lode claim.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing, and maintaining its said

Power Lines and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantor, for himself, his heirs and assigns, hereby releases the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In witness whereof the said Grantor of the first part, has hereunto set his hand and seal the day and year first above written.

Chris Knutson.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 28th day of September A. D. 1917, before me personally appeared Chris Knutson, a single man, to me known to be the individual described in, and who executed the within and foregoing instrument, and acknowledged the said instrument to be his free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport, Wash. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1929.)

Filed for record at the request of F. L. Buel, Northport, Oct. 20, 1917, at 3:09 P. M. Recorded Oct. 24, 1917. Earle T. Gates, County Auditor. Dorot-y Dexter, Deputy.

[fol. 10] 39287

Right of Way Deed

This Indenture made the eighteenth day of October A. D. 1917, between Rasmus Malde, bachelor, and Harry W. Bodey, bachelor, of the State of Washington, hereinafter called the grantors, of the first part and the Northport Power & Light Company, a corporation organized and

existing under and by virtue of the laws of the state of Washington, hereinafter called the Grantee of the second part, Witnesseth:

In consideration of the sum of two hundred dollars ($200.00) paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in wi-th in Township Forty (40) North, Range Thirty-nine (39) East W. M. in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the south boundary line of lot 15 in Section 3, Township 40 North, Range 39 E. W. M. to a point 1,130 feet east of the southwest corner of lot nine; thence from last above named point S. 26 degrees and 15' minutes E. as surveyed through, said lot 9 of said section 3 across the southern cross mining lode claim.

The said strip conveyed being forty-nine and one-half feet on each side of the said center line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said power line and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successor and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In witness whereof the said Grantors, of the first part, have hereunto set their hands and seals the day and year first above written.

Rasmus Malde, Harry W. Bodey.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 19th day of October A. D. 1917 before me personally appeared Rasmus Malde, bachelor, and Harry W. Bodey, bachelor to me known to be the individuals described in, and who executed the within and foregoing instrument, each and severally, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

John H. Bowers, Notary Public for the State of Wash., Residing at Northport, Wash. My commission expires March 11th, 1921. (Seal John H. Bowers, Notary Public, State of Washington. Commission expires Mar. 11, 1921.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:07 o'clock P. M. Recorded Oct. 23, 1917. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 11] 39286

This indenture made the 16th day of October, A. D. 1917, between F. H. Kinsell and Mary C. Kinsell, his wife, of the State of Washington, hereinafter called the Grantors, parties of the first part, and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, party of the second part, witnesseth:

In consideration of the sum of One ($1.00) Dollars paied by said grantee to said grantors, the receipt whereof is hereby acknowledged, the grantors do hereby convey and quit claim unto said grantee, its successors and assigns, all their right, title and interest in and to the follows:

The full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township 40 North, Range 39, East W.M., in Stevens County, Washing-

ton, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the North boundary of the South Half (S.½) of the Southeast Quarter (S.E.¼) of Section Three (3) Township Forty (40) North, Range Thirty-nine (39) E. W. M. 1,130 feet East of the Northwest corner;

Thence from said last above named point S. 26 degrees 15′ E. 1,471.8 feet as surveyed through the South Half (S. ½) of the Southeast Quarter (S. E. ¼) of Section Three (3), to a point on its South boundary 848.65 feet West of the corner to Sections Two (2) Three (3), Ten (10) and Eleven (11), thence S. 26 degrees 15′ E. through the Northeast Quarter (N.E.¼) of the N.E.¼ of Section Ten (10), 1,471.8 feet to a point on its South boundary 195.3 feet from the Southeast corner, containing 6.69 acres more or less.

Said strip of land being forty-nine and one-half (49½) feet on each side of the said center line.

It is also intended that the above description should include the right, privilege and authority at all times to enter into and upon the said strip of land for the purpose of constructing, repairing and maintaining grantee's power line and for any and all other purposes in connection therewith, together with the right and privilege of cutting and removing from said strip of land all timber and brush.

The validity of this deed is contingent upon the conveyance of said right of way to grantee by L. Oriard and wife.

Should said right of way be vacated at any time, the property right herein conveyed shall revert to said grantors.

In Witness Whereof the said grantors have hereunto set their hands and seals the day and year first above written.

F. H. Kinsell (Seal), Mary C. Kinsell (Seal).

STATE OF WASHINGTON,
County of Spokane, ss:

On this 16th day of October A. D. 1917, before me personally appeared F. H. Kinsell and Mary C. Kinsell, his wife, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal, this 16th day of October A. D. 1917.

E. Ben Johnson, Notary Public in and for the State of Washington, Residing at Spokane, Washington. (Seal E. Ben Johnson, Notary Public, State of Washington. Commission expires Mar. 3, 1918.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:06 P. M. Recorded Oct. 23, 1917. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 12] 39292

Right of Way Deed

This indenture made the twenty-fourth day of September, A. D. 1917, between L. Oriard, and Louise Oriard, his wife, of the State of Washington, hereinafter called the Grantors, of the first part, and Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, Witnesseth:

In consideration of the sum of One hundred and five dollars ($105.00), paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors, do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M. in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the North boundary of the S. ½ of the S. E. ¼ of Sec. 3, Twp. 40 N., Range 39 E. W. M. 1130 ft. east of the northwest corner.

Thence from said last above named point S. 26 degrees 15′ E. 1471.8 ft. as surveyed through the S. ½ of the S. E. ¼ of Sec. 3, to a point on its South boundary 848.65 ft. west of the corner to Secs. 2, 3, 10 and 11,—thence S. 26 degrees 15′ E. through the N. E. ¼ of the N. E. ¼ of Sec. 10, 1,471.8

ft. to a point on its south boundary 195.3 ft. from the southeast corner; containing 6.69 acres more or less.

The said strip conveyed being forty-nine and one-half feet on each side of the said centre line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed and described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In witness whereof the said Grantors of the first part, have hereunto set their hands and seals the day and year first above written.

L. Oriard, Louise E. Oriard.

STATE OF WASHINGTON,
County of Spokane, ss:

On this 15th day of October A. D. 1917, before me personally appeared L. Oriard, and Louise E. Oriard, his wife, to me known to be the individuals described in, and who executed the within and foregoing instrument, and each and severally acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

James W. Boothe, Notary Public for the State of Washington, Residing at Spokane. (Seal James W. Boothe, Notary Public, State of Washington. Commission expires Feb. 23, 1918.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:13 P. M. Recorded Oct. 24, 1917. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 13] 39293

Right of Way Deed

This indenture made the twenty-fourth day of September, A. D. 1917, between John Leaden and Bertha M. Leaden, his wife, of the State of Washington, hereinafter called the Grantors, of the first part, and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Twenty-five Dollars ($25.00), paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the north boundary of Lot 15, in Sec. 3, Twp. 40 N. Range 39 E. W. M., 479 ft. east of the northwest corner of said Lot 15.

Thence from said last above named point S. 26 degrees 15' E. 1471.8 ft. as surveyed through Lots 15 and 9 of said Sec. 3, to a point 1130 ft. east of the southwest corner of Lot 9; containing 3.34 acres more or less, except 1.15 acres contained in the location of the great Republic mining claim.

The said strip conveyed being forty-nine and one-half feet on each side of the said center line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said power lines.

In witness whereof the said Grantors, of the first part, have hereunto set their hands and seals the day and year first above written.

John Leaden, Bertha E. Leaden.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 2nd day of October A. D. 1917, before me personally appeared John Leaden, and Bertha E. Leaden, his wife, to me known to be the individuals described in, and who executed the within and foregoing instrument, each and severally, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport. My commission expires May 12th, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:14 P. M. Recorded Oct. 24, 1927. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 14] EXHIBIT I

39778

This Indenture made in duplicate the Twenty-fifth day of October in the year of our Lord One thousand nine hundred and seventeen. Between:—Nels Alfred Manson, of the City of Vancouver, in the Province of British Columbia, Hotel Keeper, and his wife, Annie Manson, Married Woman, hereinafter called the Grantors, Of the First Part, and The Northport Power & Light Company, a corporation

organized and existing under and by virtue of the laws of the State of Washington, one of the United States of America, hereinafter called the Grantee, Of the Second Part.

Whereas it has been agreed subject to the terms and conditions hereinafter following between the above-named parties that the Grantor shall sell and the Grantee shall purchase the right to construct and maintain a power line over the lands of the above named Grantors.

Now Therefore These Presents Witnesseth that in consideration of the sum of One dollar ($1.00) and other valuable considerations now paid by the said Grantee to the said Grantors (the receipt whereof is hereby acknowledged) the Grantors do hereby grant, sell, convey and assign unto the said Grantee, its successors and assigns the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its power lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances over, across and upon a strip of land ninety-nine (99) feet in width, in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, in the State of Washington, one of the United States of America, the center line of which strip is surveyed and marked upon the ground and is described as follows: Beginning at a point on the international boundary line One hundred and forty-two and forty-four one-hundredths (142.44) feet East of the Northwest corner of Lot Twelve (12), in Section Three (3), Township Forty (40), North, Range Thirty-nine (39) E. W. M., thence from the said last named point south Twenty-six degrees fifteen minutes (26 degrees 15') East Two thousand three hundred and eighty-five feet (2385) feet through Lots Twelve (12), Thirteen (13) and Fourteen (14) of the said Section Three (3), to a point on the said boundary line of the said Lot Fourteen (14) a distance of Four hundred and seventy-nine (479) feet, East of the Southwest corner of the said Lot Fourteen (14) and represented by the survey as made by the above named Grantee as containing Five and forty-two one-hundredths (5.42) acres more or less, as shown by a plan of the survey of the said strip a blueprint of which is hereunto annexed. Subject however to such reservations and provisos as are hereinafter provided, that is to say, that the said Grantors shall have the right to enter upon

the said strip and to cross the same from time to time and at all times, and to enter upon the said lands and construct such fences, dykes or draining ditches as he may from time to time and at any time see fit.

Provided Further However that the Grantee, its successors and assigns shall at all times have the right, privilege and authority to enter into and upon the said strip of land for the purpose of constructing, repairing and maintaining its said power lines, and for any other purpose in connection with the said power lines.

Provided Further that the said Grantee shall have the right and privilege to cut and remove from the said strip of lands all timber and brush necessary to be removed for the purpose of the proper construction and maintenance of the said power lines.

And the Grantors for themselves, their heirs, executors, administrators and assigns Do Hereby Release the said Grantee its successors and assigns of and from any and all [fol. 15] claims for damages resulting from the said strip of land in this Deed described and conveyed by reason of the location and construction, maintenance and operation of its said lines.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and date first above written.

Nels Alfred Manson (Seal). Annie Manson, by Her Attorney-in-Fact, Nels Alfred Manson (Seal).

Signed, sealed, and delivered in the presence of G. G. McGerr, Barrister, Vancouver, B. C.

Filed for record at the request of Northport Power & Light Co., Nov. 13, 1917, at 3:55 P. M. Recorded Nov. 15, 1917. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 16] EXHIBIT I.

Right of Way Deed

This indenture made the 3rd day of October A. D. 1917, between Mary Catherine Lee & William I. Lee wife & Husband of the State of Washington, hereinafter called the

Grantor, of the first part and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the Second Part, Witnesseth:

In consideration of the sum of One hundred & Seventy-five Dollars $175.00, paid by the said Grantee to said Grantor, the receipt whereof is hereby acknowledged, the Grantor does hereby grant, sell, convey and confirm unto the said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is sirveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the North Boundary of the S. E. ¼ of the N. E. ¼ of Sec. 10, T. 40., R. 39 E. W. M., 195.3 ft. West of the Northeast corner thereof.

Thence S. 26 degrees 15′ E. through the S. E. ¼ of the N. E. ¼ of said Section 10 and the S. W. ¼ of the N. W. ¼ of Section 11, said Township and Range, a distance of 1471.8 ft. to a point on the south boundary of the S. W. ¼ of the N. W. ¼ of said Section 11, 453.7 ft. east of the ¼ Section corner between Sections 10 and 11; Thence S. 26 degrees 15′ E. 1285.3 ft. and Thence S. 34 degrees 15′ E. 202.35 ft., through the N. W. ¼ of the S. W. ¼ of said Section 11 to a point on the South boundary of said N. W. ¼ of S. W. ¼ 183.9 ft. West of the S. E. corner thereof, with a strip of land 49.5 ft. in width on both sides of the line so described containing 6.73 acres more or less.

Also granting unto said Grantee, its successors and assigns the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantor, for herself, her heirs and assigns, hereby releases the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

To have and to hold said described strips of land to said Grantee, its successors and assigns, so long as same is used as and for Power Lines or Power Line and no longer.

In witness whereof the said Grantor of the first part has hereunto set her hand and seal the day and year first above wirtten.

Mary Catharine Lee (Seal), William I. Lee (Seal).

[fol. 17] STATE OF WASHINGTON,
County of Stevens:

On this 3rd day of October A. D. 1917, before me personally appeared Mary Catherine Lee & William I. Lee, wife & husband to me known to be the individuals described in, and who executed the within and foregoing instrument, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above mentioned.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport. My commission expires May 12, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3 28 P. M. Recorded Oct. 24, 1917. Book 54, Page 218. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 18] EXHIBIT I

39290

Right of Way Deed

This indenture, made the twenty-fourth day of September, A. D. 1917, between Joseph Vanash, a single man, of

the State of Washington, hereinafter called the Grantor, of the first part, and the Northport Power & Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Two hundred and ten Dollars ($210.00) paid by said Grantee to said Grantor, the receipt whereof is hereby acknowledged, the Grantor does hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over across and upon *a* a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the north boundary of the S. ½ of the S. W. ¼ of Sec. 11, Twp. 40 N., Range 39, E. W. M., 1136.1 ft. east of the northwest corner.

Thence from said last above named point S. 34 degrees 15′ E. 1596.9 ft. as surveyed through the S. ½ of the S. W. ¼ to a point on its south boundary 605.1 ft. west of the ¼ Sec. corner between Secs. 11 and 14; containing 3.62 acres more or less.

The said strip conveyed being forty-nine and one-half feet on each side of the said center line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all purposes; also grantng the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantor, for himself, his heirs and assigns, hereby releases the said grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In witness whereof the said Grantor of the first part, has hereunto set his hand and seal the day and year first above written.

Joseph (his X mark) Vanash.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 4th day of October, A. D., 1917 before me personally appeared Joseph Vanash, a single man, to me known to be the individual described in, and who executed the within and foregoing instrument and acknowledged the said instrument to be his free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport. My commission expires May 12, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:11 P. M. Recorded Oct. 24, 1917. Book 54, page 213. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 19] EXHIBIT I

39289

Right of Way Deed

This indenture made the 2nd day of October A. D. 1917, between the Kendrick Mercantile Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantor, of the first part, and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Fifty-Dollars, paid by said Grantee to said Grantor, the receipt whereof is hereby ac-

knowledged, the Grantor does hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the north boundary of the N. E. ¼ of the N. W. ¼ of Sec. 14, Twp. 40 N., Range 39 E. W. M., 605.1 ft. west of the ¼ sec. corner between Secs. 11 and 14, thence from said last above named point S. 34 degrees 15′ E. 268.3 ft.,—thence S. 47 degrees 23′ E. 617.6 ft. as surveyed through the N. E. ¼ of the N. W. ¼ to a point on its east boundary 639.5 ft. south of the said ¼ Sec. corner; containing 2.0 acres more or less.

The said strip conveyed being forty-nine and one-half on each side of said center line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes; Also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantor, for itself, its successors and assigns, hereby releases the said Grantee, its successors and assigns, from any and all claim for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

To have and to hold said described strips of land to said Grantee, its successors and assigns, so long as same is used as and for Power Lines or Power Line and no longer.

In witness whereof the said Grantor Corporation, in pursuance of a Resolution of its Board of Directors duly passed and entered on its books, has caused this instrument to be signed and the corporate seal to be affixed by its proper and

duly authorized officers, the day and year first above written.

Kendrick Mercantile Company, By C. S. Slawson, President. J. H. Stroh, Secretary. (Seal Kendrick Mercantile Co., Northport, Wash. Incorporated 1889.)

[fol. 20] State of Washington,
County of Stevens, ss:

On this 2nd day of October A. D. 1917, before me personally appeared C. S. Slawson and J. H. Stroh to me known to be the President and Secretary, respectively, of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport. My commission expires May 12th, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:10 P. M. Recorded Oct. 24, 1917. Book 54, page 212. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 21] Exhibit I

41386

This Indenture, Made this twenty-fourth day of December A. D. 1917, between the Upper Columbia Company, a corporation organized and existing under and by virtue of the laws of the State of Washington hereinafter called the Grantor, of the first part, and the Northport Power and Light Company, a corporation organized and existing under

and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, Witnesseth:

In consideration of the sum of one thousand six hundred and fifteen dollars and fifty cents ($1615.50), paid by said Grantee, to said Grantor, the receipt whereof is hereby acknowledged, the Grantor does hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over across and upon a strip of land ninety-nine feet in width, being 49.5 feet on each side of said centre line, in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the centre line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the west boundary line of the Southeast quarter (S. E. ¼) of the Northeast quarter (N. E. ¼), Section fourteen (14), Township forty (40) North, Range thirty-nine (39) E. W. M., 557 feet, south of the northwest corner of said southeast quarter (S. E. ¼) of the Northeast quarter (N. E. ¼), thence south 47 degrees 23′ East 1808.5 feet through the said southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼) and the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼) of said Section fourteen (14), to a point on the section line between Sections thirteen (13) and fourteen (14), 482.9 feet south of the quarter section corner, containing 4.11 acres, more or less.

Thence from said last above named point S. 47 degrees 23′ East 2550.4 feet; thence following a 5 degree curve to the right 528.3 feet through the southwest quarter (S. W. ¼) of Section Thirteen (13), to a point on the south boundary line of said Section thirteen (13) 436 feet west of the quarter section corner between Sections thirteen (13) and twenty-four (24), containing 7.00 acres, more or less.

Thence from said last above named point, following a 5 degree curve to the right, the course of whose tangent at this point is S. 15 degrees 09′ East, 233 feet, thence S. 9 degrees 19′ East, 5098.4 feet through Section twenty-four (24) to a point on the south boundary line of said section 433.6 feet east of the quarter section corner between Sections

twenty-four (24) and twenty-five (25); containing 12.24 acres, more or less.

Thence beginning at a point on the north boundary line of the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼) of Section Twenty-five (25) 650 feet east of the northwest corner of said southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼) thence S. 9 degrees 19′ East through the said southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼) 1337.6 feet to a point on the south boundary line of said southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼) 866.6 feet east of the southwest corner thereof; containing 3.04 acres, more or less.

Thence beginning at a point on the North boundary line of Lot four (4) in Section thirty-six (36) 33.84 feet east of the northwest corner of said Lot, thence S. 9 degrees 19′ East, 371.6 feet; thence following a 5 degree curve to the left for 390 feet; thence S. 28 degrees 49′ East, 1563.9 feet through said Lot four (4) to the north bank of the Columbia River; containing 5.27 acres, more or less.

[fol. 22] Also the following described strips of land in said Township Forty (40) North, Range thirty-nine (39) E. W. M., to wit:

Beginning at the southwest corner of Lot six (6) in Section twenty-five (25), thence north along the west boundary line of said Lot, 423, feet; thence S. 9 degrees 19′ East, 428.7 feet to the south boundary line of said Lot; thence West 69.4 feet to the point of beginning; containing 9.34 acres, more or less.

Beginning at the northeast corner of Lot seven (7), Section twenty-five (25) thence South 144.5 feet to the southeast corner of said Lot; thence west 11.36 feet; thence N. 9 degrees 19′ W. 146.43 feet to the north boundary line of said Lot; thence East 28.5 feet to the point of beginning; containing 0.07 acres, more or less.

Beginning at the northwest corner of Lot eleven (11) Section twenty-five (25) thence South 144.5 feet to the southwest corner of said Lot; thence East 84.04 feet; thence N. 9 degrees 19′ west, 146.43 feet to the north boundary line of said Lot; thence West 69.4 feet to the point of beginning; containing 0.22 acres, more or less.

Beginning at the northeast corner of Lot 1, Section thirty-six (36) thence South 69.27 feet, thence N. 9 degrees 19' West, 70.2 feet to the north boundary line of said Lot; thence East 11.36 feet to the point of beginning; containing 0.02 acres, more or less.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes; in connection therewith, also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantor, for itself, its successors and assigns, hereby releases the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

To have and to hold said described strips of land to said Grantee, its successors and assigns, so long as same is used as and for Power Lines or Power Line and no longer.

In witness whereof the said Grantor corporation, in pursuance of a Resolution of its Board of Directors duly passed and entered on its books, has caused this instrument to be signed and the corporate seal to be affixed by its proper and duly authorized officers, the day and year first above written.

Upper Columbia Co., by R. B. Marchant, President.

Attest: C. S. Pinkerton, Secretary. (Corporate Seal Upper Columbia Company, State of Washington, 1909.)

4 50¢ U. S. I. R. Documentary Stamps cancelled. E. T. G., 1-19-18.

STATE OF NEW YORK,
County of New York, ss:

On this 4 day of Jany, A. D. 1918 before me a Notary Public in and for said County and State personally appeared R. B. Marchant and C. S. Pinkerton to me known to be the President and Secretary respectively, of the corporation

that executed the within instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

[fol. 23] In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Harry W. Finney, Notary Public for the State of New York, County of N. Y., Residing at N. Y. City. My commission expires Mch. 30, 1918. (Seal Harry W. Finney, Notary Public, New York County.)

No. 83258, Series B

State of New York,
County of New York, ss:

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do hereby certify, That Harry W. Ginney whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York.

And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court and County, the 5 day of Jany. 1918.

Wm. F. Schneider, Clerk. (New York Seal.)

Filed for record at the Northport P. & L. Co. Jan. 19, 1918, at 4 o'clock P. M. Recorded Jan. 22, 1918. Book 54,

page 55[illegible]. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 24] Exhibit I

39291

Right of Way Deed

This indenture made the twenty-four day of September, A. D. 1917, between Wm. P. Hughes, a single man, of the State of Washington, hereinafter called the Grantor, of the first part, and the Northport Power & Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Fifteen Dollars ($15.00), paid by said Grantee to said Grantor, the receipt whereof is hereby acknowledged, the Grantor does hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point 485.3 feet south and 66 ft. west of the northeast corner of the S. W. ¼ of N. E. ¼ of Section 14, Township 40 North, Range 39, E. W. M., Stevens County, Washington.

Thence from said last above named point S. 47 degrees 23' E. through a tract 66 ft. in width in the said S. W. ¼ of N. E. ¼ being the east 66 ft. of said S. W. ¼ of N. E. ¼, a distance 97.5 ft. to the east boundary of said tract, with a strip of land 49.5 ft. in width on both sides of the line so described, containing about 0.2 acres, more or less.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said

Power Lines and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

And the Grantor, for himself, his heirs and assigns, hereby releases the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed and described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In witness whereof the said Grantor of the first part, has hereunto set his hand and seal the day and year first above written.

Wm. P. Hughes.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 28th day of Sept. A. D. 1917, before me personally appeared Wm. P. Hughes, a single man, to me known to be the individual described in, and who executed the within and foregoing instrument, and acknowledged the said instrument to be his free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport. My commission expires May 12th, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:12 P. M. Recorded Oct. 24, 1917. Book 54, page 215. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 25] Exhibit I

41991

Easement Deed for Substation Site at Northport

This indenture, made the 22nd day of December A. D. 1917, between the Northport Smelting and Refining Com-

pany, a corporation organized and existing under and by virtue of the laws of the State of Idaho hereinafter called the party of the first part and Northport Power and Light Company, a corporation, organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Party of the Second Part;

Witnesseth, That in consideration of the sum of One Dollar ($1.00) this day paid by the Party of the Second Part to the Party of the First Part, the receipt whereof is hereby acknowledged, that the party of the first part does hereby grant, convey, release, assign and confirm to the Party of the Second part, its successors and assigns, the right to erect and maintain, keep and have an area or enclosure for the purpose of erecting and maintaining a Substation Building, whether now erected or hereafter to be erected by the Party of the Second Part, such substation building to be used as may be deemed necessary for the distribution of electric power with all necessary machinery, appliances, fittings, attachments and wires into and out of said Substation. The said area or enclosure to enclose the following described piece or parcel of land, lying and being in the County of Stevens, State of Washington, namely, commencing:

From a point on the section line between Sections four (4) and Five (5) Township Thirty-nine (39) N. R. Forty E. W. M. at the intersection of the Great Northern Railway Right-of-way, the boundary line of the Town of Northport, and the smelter grounds of the Northport Smelting and Refining Company.

Thence S. 76 degrees 11′ E. 481.01 ft. to the place of beginning; Thence N. 61 degrees 11′ E. 80.0 ft. Thence S. 28 degrees 49′ E. 164.0 ft. Thence S. 61 degrees 11′ W. 48.83 ft. Thence N. 78 degrees 49′ W. 40.59 ft. Thence N. 28 degrees 49′ W. 138.0 ft. to the place of beginning, excepting a strip of land 6.42 ft. by 33.42 ft. contained in the Rectifier Building of said Northport Smelting and Refining Company, the area of the tract herein conveyed being 0.285 acres, more or less.

And also the full power, license and permission at all times hereafter for the representatives, officers, workmen and servants of the Party of the Second part, its successors and assigns, and with or without horses, wagons, auto-

mobiles and appliances to enter upon the said land of the Party of the First Part with full right of ingress and egress to and from and over the same for the purpose of operating, maintaining and repairing and changing such sub-station.

To have and to hold the same with all the privileges and appurtances thereof to the Party of the Second part, its successors and assigns.

The grant herein contained is made upon the condition and the party of the second part, for itself, its successors or assigns covenants and agrees with the party of the First Part, its successors or assigns, that it will remove said Substation that may now be erected or hereafter to be erected or constructed by or under the authority of the Party of the Second Part, its successors or assigns or its predecessors on the land above mentioned to some other convenient location to be designated and provided free of costs and charges by the Party of First Part, its successors or assigns, upon the Party of the Second Part, its successors or assigns being served by the Party of the First Part, its successors or assigns, with notice in writing so to do at least six months prior to the time such removal shall be required.

It is further understood and agreed between the parties hereto, each for itself, its successors or assigns, that in the event of such removal being required by the Party of [fol. 26] the First Part, its successors or assigns, said Substation shall be moved and reconstructed by the Party of the Second Part its successors or assigns, at the expense of the Party of the First Part, its successors or assigns, within six months after service of such notice as aforesaid and if the Party of the Second Part, its successors or assigns, shall fail to make any such removal so requested within six months after service as aforesaid, of notice to remove or on or prior to such later date as may be required, then and in every such event the party of the First Part, its successors or assigns, may forthwith remove, at their own expense, the sub-station so required to be removed, to such convenient location as is designated in such notice.

It is further understood and agreed by and between the parties hereto, each for itself, its successors or assigns, that if any dispute shall arise between the parties hereto

or between their respective successors or assigns, as to the amount of the expense of removing or reconstructing any such substation the amount of such expense and all other matters of difference which may arise between the parties hereto, their suecessors or assigns, respectively, with respect to such substation, shall be determined by arbitration.

In witness whereof the said first party corporation in pursuance of a Resolution of its Board of Directors duly passed and entered on its books, has caused this instrument to be signed and the corporate seal to be affixed by its proper and duly authorized officers and the day and year first above written.

Northport Smelting & Refining Co., by Jerome J. Day, Its President, and Eugene R. Day, Its Secretary. (Seal Northport Smelting and Refining Company, Wallace, Idaho. Incorporated 1901.)

STATE OF IDAHO,
County of Shoshone, ss:

On this 28th day of December A. D. 1917, before me personally appeared Jerome J. Day and Eugene R. Day to me known to be the President and Secretary respectively, of the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

Walter B. Heitfeld, Notary Public for the State of Idaho, Residing at Wallace, Idaho. (Seal Walter B. Heitfeld, Notary Public, State of Idaho. My commission expires Oct. 9, 1919.)

Filed for record at the request of Northport Power & Light Co., Rossland, B. C., Feb. 21, 1918, at 3:40 P. M. Book 55, page 13. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 27] EXHIBIT I

41992

Agreement

This indenture, made in duplicate the 22nd day of December, A. D. 1917, between the Northport Smelting and Refining Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, with its Head Office at Wallace, in the State of Idaho, One of the United States of America (hereinafter called the Grantor) of the first part, and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the state of Washington, one of the United States of America, with its Head Office at Northport, in the said State (hereinafter called the Grantee) of the second part:

Whereas by an Indenture dated the 22nd day of December A. D. 1917, and entered into by and between the parties hereto, the Grantor did grant and convey to the Grantee the right to erect and maintain and keep and have an area for the purpose of erecting and maintaining a sub-station building for the distribution of electric power with all the necessary machinery, appliances, fittings, attachments and wires into and out of the said sub-station, the said area or enclosure to enclose the following described piece or parcel of land, lying and being in the County of Stevens, State of Washington, namely, commencing:

From a point on the Section line between Sections Four (4) and Five (5), Township Thirty-nine (39) N. R. Forty (40) E. W. M. at the intersection of the Great Northern Railway Right-of-way, the boundary line of the Town of Northport, and the Smelter grounds of the Northport Smelting and Refining Company; Thence S. 76 degrees 11′ E. 481.01 ft. to the place of beginning: Thence N. 61 degrees 11′ E. 80.0 ft. Thence S. 28 degrees 49′ E. 164.0 ft. Thence S. 61 degrees 11′ W. 48.83 ft. Thence N. 78 degrees 49′ W. 40.59 ft. Thence N. 28 degrees 49′ W. 138.0 ft. to the place of beginning: excepting a strip of land 6.42 feet by 33.42 feet contained in the Rectifier building of said Northport

Smelting and Refining Company, the area of the tract herein conveyed being 0.285 acres, more or less and by such Agreement the Grantee agreed to remove said sub-station from the aforesaid land to some other convenient location to be designated and provided free of costs by the Grantor if the Grantor so desired and gave notice accordingly.

Now this indenture witnesseth that in consideration of the premises and of the sum of One Dollar ($1.00) now paid by the said Grantee to the said Grantor (The receipt whereof is hereby acknowledged) the Grantor doth hereby grant and convey unto the Grantee, its successors and assigns, the full free and uninterrupted right and liberty to the Grantee, its successors and assigns, to erect and maintain their pole line with all the necessary wires and attachments connected therewith upon and over a strip of land Ten (10) feet in width which is bounded and divided as follows:

Beginning at the junction of the East Wall of the Substation building of the Northport Power and Light Company with the South Wall of the Rectifier building of the Northport Smelting and Refining Company;

Thence S. 28 degrees 49′ E. 70.0 ft; Thence S. 61 degrees 11′ W. 719.12 ft. to the Section line between Sections 4 and 5; Thence S. 0 degrees 19′ W. 11.45 ft. along said Section line to a point 4.5 ft. from the South line of Centre Street; Thence N. 61 degrees 11′ E. 734.69 ft. parallel to the South line of said Centre Street. Thence N. 28 degrees 49′ E. 80.0 ft. to the South line of the Rectifier Building; Thence S. 61 degrees 11′ W. 10.0 ft. to the place of beginning; Also [fol. 28] commencing at a point on the section line between sections 4 and 5, Township 39 N. Range 40 E. W. M. at the intersection of the Great Northern Railway right-of-way and the north boundary of the grounds of the Northport Smelting & Refining Company, N. 61 degrees 11′ E. 373.18 ft. to the place of beginning.

Thence S. 28 degrees 49′ E. 469.18 ft. with a strip of land 49.5 ft. in width on both sides of the center line so described, to the fence bounding the said Smelter grounds, except that portion of ground included in the substation grounds of the Northport Power & Light Company, and for the purpose of erecting, maintaining and repairing such poles and lines, wires, and attachments connected therewith

full liberty to the Grantee, its agents, servants and workmen at all times to enter in and upon the said lands. And the Grantor for itself, its successors and assigns hereby covenants with the Grantee that if at any time the said substation building referred to in the hereinbefore in part recited Agreement of the 22nd day of December, should be removed to another location then that the Grantor, its successors or assigns will, in lieu of this grant herein contained, grant and convey unto the Grantee its successors and assigns the full, free and uninterrupted liberty to the grantee, its successors and assigns to maintain their pole line with the necessary wires and attachments connected therewith upon and over a strip of land Ten (10) feet in width from such new location across the lands of the Grantor to the point where the pole line of the Grantee now or hereafter enters on to their premises; and in this event then the Grantee, its successors and assigns will have the right and privilege to remove their pole line with all necessary wires and attachments from the property mentioned and described in this grant and to erect the same or others in lieu thereof upon the new location free of all costs and charges to it and that the Grantor, its successors and assigns will pay and bear all expense so incurred by the Grantee, its successors and assigns in and incidental to such removal; And the Grantor for itself, its successors and assigns, doth release the Grantee, its successors and assigns from all claims over any and all damages resulting to the lands through and across which said pole line is located or is hereafter to be located by reason of the location, construction maintenance and operation of a line of poles and wires for conveying electricity across the lands.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Jerome J. Day, for Northport Smelting & Refining Co. (Seal Northport Smelting and Refining Company, Wallace, Idaho. Incorporated 1901.)

Signed, sealed and delivered in the presence of W. B. Heitfeld, Jos. A. Brown.

Filed for record at the request of Northport Power & Light Co. Feb. 21, 1918, at 3:41 P. M. Recorded Feb. 23,

1918. Recorded in Book "55", page 15. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 29] EXHIBIT I

39743

Right of Way Deed

This Indenture made the 8th day of November A. D. 1917, between Sam Edwards, and Lena Edwards, his wife, of the State of Washington, hereinafter called the Grantors, of the first part, and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Sixty-two Dollars ($62.00) paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the north boundary line of Lot 9, Section 25, Township 40 N. Range 39 E. W. M., 149.8 ft. west of the northeast corner of said lot.

Thence S. 9 degrees 19′ E. 908.95 ft. to a point on the East boundary line of said Lot 9; Thence South along the east boundary line 423 ft. to the southeast corner of said Lot 9; Thence west 28.5 feet; Thence N. 9 degrees 19′ W. 1337.65 ft. to a point on the north boundary line of said Lot 9; thence East along said north boundary line 100.4 ft. to the place of beginning containing 2.7 acres more or less.

The said strip conveyed being forty-nine and one-half feet on each side of the said centre line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter

into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush, and to fall timber on each side of the Right of Way which would reach the line.

And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed and described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In Witness Whereof, the said Grantors of the first part, have hereunto set their hands and seals the day and year first above written.

Sam Edwards, Amelia P. Edwards.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 8th day of November A. D. 1917, before me personally appeared Sam Edwards, and Lena Edwards, his wife, to me known to be the individuals described in, and who executed the within and foregoing instrument, each and severally, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

[fol. 30] In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport, Wash. My commission expires May 12th, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of Stevesn Co. Abst. Co. Nov. 12, 1917, at 11:25 A. M. Recorded Nov. 13, 1917. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 31] 39295

Right of Way Deed

This Indenture made the twenty-fourth day of September, A. D. 1917, between Harry C. Butler and Josephine Butler, his wife, of the State of Washington, hereinafter called Grantors, of the first part; and the Northport Power & Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Two Hundred Dollars ($200.00) paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the West boundary of the W. ½ of the N. E. ¼ of Section 14, Township 40 North, Range 39, E. W. M., 639.5 ft. south of the ¼ Section corner between Sections 11 and 14; Thence from said last above named point S. 47 degrees 23' E. 1697 ft. through the W. ½ of the N. E. ¼ to a point on the west boundary of a tract of land 66 feet wide on the East side of the S. W. ¼ of the N. E. ¼ of said Section 14, 485.3 ft. south of the northwest corner of said tract, containing 3.87 acres more or less

The said strip conveyed being forty-nine and one-half feet on each side of the said center line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes; also granting the right and privilege unto said Grantee to cut

and remove from said granted lands all timber and brush.

And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successor and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In witness whereof the said grantors of the first part, have hereunto set their hands and seals the day and year first above written.

Harry C. Butler, Mrs. Josephine Butler.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 1st day of October A. D. 1917, before me personally appeared Harry C. Butler and Josephine Butler, his wife, to me known to be the individuals described in and who executed the within and foregoing instrument, and each and severally acknowledged the said instrument to be their free and voluntary act and deed for the use and purpose therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, residing at Northport. My commission expires May 12th, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:30 P.M. Recorded Oct. 24, 1917. Book "54", page 214. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 32] EXHIBIT I

39654

Right of Way Deed

This indenture made the 3rd day of Nov. A. D. 1917, between the St. Crispin Mining Milling Smelting and

Developing Company a corporation organized and existing under and by virtue of the laws of the State of Washington hereinafter called the Grantor, of the first part, and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of Three Hundred & No/100 Dollars, paid by said Grantee to said Grantor, the receipt whereof is hereby acknowledged, the Grantor does hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit: Beginning at a point on the north boundary line of the N. W. ¼ of the N. E. ¼, Section 25, Township 40 N. Range 39, E. W. M., 433.6 ft. east of the ¼ Sec. corner between Sections 24 and 25; thence S. 9 degrees 19′ E. as surveyed through the Smuggler, St. Crispin, Safety and Hoodoo mining claims, 1337.6 ft. to a point on the south boundary line of said N. W. ¼ of the N. E. ¼, 650 ft. east of the southwest corner thereof; containing 3.04 acres, more or less.

The said strip conveyed being forty-nine and one-half feet on each side of the said centre line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said Power Lines and for any and all other purposes except mining also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush, and to fall timber on each side of the Right of Way which would reach the line.

And the Grantor, for itself, its successors and assigns, hereby releases the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands

in this deed and described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

In witness whereof the said Grantor corporation, in pursuance of a Resolution of its Board of Directors duly passed and entered on its books, has caused this instrument to be signed and the corporate seal to be affixed by its proper and duly authorized officers, the day and year first above written.

The St. Crispin Mining, Milling, Smelting & Developing Company, by H. W. Brooks, President, and Wm. P. Hughes, Secretary pro tem. (Corporate seal St. Crispin Mining, Milling, Smelting and Developing Company of Northport, Washington.)

[fol. 33] STATE OF WASHINGTON,
County of Stevens, ss:

On this 5th day of November, A. D. 1917, before me, a Notary Public in and for said County and State personally appeared H. W. Brooks and Wm. P. Hughes, respectively, of the corporation that executed the within instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

John H. Bowers, Notary Public for the State of Washington, Residing at Northport, Wash. My commission expires March 11, 1921. (Seal John H. Bowers, Notary Public, State of Washington. Commission expires Mar. 11, 1921.)

Filed for record at the request of Stevens County Abst. Co. Nov. 7, 1917, at 3:18 P. M. Recorded Nov. 8, 1917. Book 54, page 284. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 34] EXHIBIT I

39403

Right of Way Deed

This indenture, made the 25th day of October A. D. 1917, between John D. Phillips, and Fannie Phillips, his wife, of the State of Washington, hereinafter called the Grantors, of the first part, and the Northport Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the Grantee, of the second part, witnesseth:

In consideration of the sum of One Hundred and Twenty-five Dollars ($125.00) paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct operate and maintain its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M., in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

Beginning at a point on the north boundary line of Lot 5, Sec. 25, Twp. 40 N., R. 39 E. W. M., 866.6 ft. east of the northwest corner of said Lot; thence S. 9 degrees 19' E. 1202.6 ft., as surveyed through said Lot 5, to a point on the north boundary line of Lot 9, said Section 25, 200 ft. west of the northeast corner of said Lot; containing 2.73 acres more or less.

The said strip conveyed being forty-nine and one-half feet on each side of the said centre line.

Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing, and maintaining its said Power Lines for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush,

and to fall timber on each side of the Right of Way which would reach the line.

And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successors and assigns, from any and all claims for damages resulting to the lands in this deed and described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines. Reserving the right to crop and cultivate said land and passage over same at all times not interfering with second party's right to use the same for its purposes as herein before set forth. This easement to cease and determine if said land is abandoned for the uses aforesaid.

In witness whereof the said Grantors of the First Part, have hereunto set their hands and seals the day and year first above written.

John D. Phillips, Fannie Phillips.

STATE OF WASHINGTON,
County of Stevens, ss:

On this 25th day of October A. D. 1917, before me personally appeared John D. Phillips and Fannie Phillips, his wife, to me known to be the individuals described in, and who executed the within and foregoing instrument, each and severally, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

C. E. Allison, Notary Public for the State of Washington, Residing at Northport, Wash. My Commission expires May 12, 1920. (Seal C. E. Allison, Notary Public, State of Washington. Commission expires May 12, 1920.)

Filed for record at the request of Stevens County Abstract Co. Oct. 26, 1917, at 3:16 P. M. Recorded Oct. 27, 1917. Book 54, page 248. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy.

[fol. 35] EXHIBIT I

Ordinance No. 124

An Ordinance Granting to the Northport Power & Light Company, its Associates, Successors, and Assigns, a Franchise to Construct and Operate a System of Conductors for the Distribution of Electricity in the Town of Northport.

Be it ordained by the Council of the town of Northport:

Section 1. There is hereby granted and given to the Northport Power & Light Company, its associates, successors and assigns, permission and authority to construct, maintain and operate for the term of ten (10) years from and after the date of the passage and publication of this Ordinance, a system or systems of conductors, either overhead or underground or both, for the distributing of electric currents to be used for light, heat or power on the streets, alleys, tunnels, bridges and public grounds in such manner as not to interfere with the general use of such streets.

Section 2. The said above named party and its associates, successors and assigns shall have the right to erect and maintain suitable poles or other devices within the town walk or lines along the sides of the streets, avenues, alleys and public thoroughfares of said town, with suitable wires and other devices for the purpose of or proper construction of a system for the purposes above mentioned, and to place, maintain and operate thereon and by means thereof electric wires, devices and currents for such purposes, provided such wires shall not be maintained at a height of less than eighteen feet above the surface of the street. Wires and other devices shall not unreasonably interfere with the ordinary level and necessary use of said bridges, streets, alleys, etc.

Section 3. The said Northport Power & Light Company and its associates, successors or assigns, shall repair any damage to any street, sidewalk, or public property occasioned by the construction and maintenance of their works, and the said Northport Power & Light Company and its associates, successors and assigns shall erect

all poles and devices in a workmanlike manner and after such *owrk* is completed, shall remove from all streets, or alleys, all surfac*r* sand, earth, rubbish or other material which may be taken up or dug up in the construction or erection of said poles or devices, and shall put all streets or alleys in as good condition as they were before being dug up or disturbed.

Section 4. Said system of electric distribution and all things thereto belonging or in any wise appertaining shall be constructed and at all times operated and maintained in the safest and most approved manner with every possible safeguard against danger to life or property.

Section 5. This ordinance shall take effect and be in force from and after its passage and publication.

Passed first reading September 4th, 1918.

Passed second reading and placed upon its final passage and duly passed October 2, 1918.

Approved by the Mayor Oct. 2nd, 1918.

(Sgd.) L. L. Leonard, Mayor pro Tem.

Attest: (Sgd.) Jesse Garver, Clerk, by (Sgd.) John R. Stout, Deputy.

Approved as to form. (Sgd.) Frank C. Hale, City Attorney.

[fol. 36] EXHIBIT I

Resolution

Be it hereby resolved by the City Council of the City of Northport, County of Stevens, State of Washington, that the schedule of lighting rates attached to Ordinance number 124 of said City, which ordinance granted a franchise to the Northport Power and Light Company, to construct and operate a system of conductors for the distribution of electricity, in the City of Northport, are hereby accepted by the said City.

Adopted by the City Council at a regular meeting held November 6th, 1918.

(Sgd.) L. L. Leonard, Mayor pro Tem.

Attest: Jesse Garver, City Clerk, by John R. Stout, Deputy.

Northport Power & Light Company. (Sgd.) J. D. McDonald, General Supt.

Witness: (Sgd.) I. J. Trembath.

[fol. 37] EXHIBIT I

Franchise with the City of Northport, Wash.

Ordinance No. 133

An Ordinance Granting to the Northport Power & Light Company, Its Associates, Successors, and Assigns, a tors for the Distribution of Electricity in the Town of Northport

Be it ordained by the Council of the town of Northport:

Section 1. There is hereby granted and given to the Northport Power & Light Company, its associates, successors and assigns, permission and authority to construct, maintain and operate for the term of Ten (10) years from and after the date of the passage and publication of this Ordinance, a system or systems of conductors, either overhead or underground, or both, for the distributing of electric currents to be used for light, heat, or power on the streets, alleys, tunnels, bridges and public grounds in such manner as not to interfere with the general use of such streets.

Section 2. The said above named party and its associates, successors and assigns, shall have the right to erect and maintain suitable poles or other devices within the town walk er lines along the sides of the streets, avenues, alleys and public thoroughfares of said town, with suitable wires and other devices for the purpose of or proper construction of a system for the purposes above mentioned, and to place, maintain and operate thereon and by means thereof electric wires, devices and currents for such purposes, provided such wires shall not be maintained at a height of less than eighteen feet above the surface of the street. Wires and other devices shall not unreasonably interfere with the ordinary level and necessary use of said bridges, streets, alleys, etc.

Section 3. The said Northport Power & Light Company and its associates, successors or assigns, shall repair any damage to any street, sidewalk or public property occasioned by the construction and maintenance of their works, and the said Northport Power & Light Company and its associates, successors and assigns shall erect all poles and devices in a workmanlike manner and after such work is completed shall remove from all streets or alleys, all surfact sand, earth, rubbish or other material which may be taken up or dug up in the construction or erection of said poles or devices, and shall put all streets or alleys in as good condition as they were before being dug up or distrubed.

Section 4. Said system of electric distribution and all things thereto belonging or in any wise appertaining shall be constructed and at all times operated and maintained in the safest and most approved manner, with every possible safeguard against danger to life or property.

Section 5. The said Northport Power & Light Company and its associates, successors or assigns, shall pay monthly to the town of Northport, as a consideration for the permission herein granted, a sum equal to two thirds of the amount paid monthly for street lights by the Municipality of the town of Northport to the said Northport Power & Light Company.

[fol. 38] Section 6. This ordinance shall take effect and be in force from and after its passage and publication.

Passed first reading November 21st, 1928.

Passed second and third reading and placed upon its final passage and duly passed December 5th, 1928.

Approved by the Mayor December 5th, 1928.

(Sgd.) J. M. Tyllia, Mayor.

Attest: (Sgd.) Carrie Allen, Town Clerk. (Seal City of Northport.)

[fol. 39] EXHIBIT I

Be it hereby resolved by the City Council of the City of Northport, County of Stevens, State of Washington that the schedule of lighting rates, being rates, rules and regulations as filed and published, attached to Ordinance No. 133

of said City, which Ordinance granted a franchise to the Northport Power and Light Company to construct and operate a system of Conductors for the distribution of electricity, in the City of Northport, are hereby accepted by the said city.

Adopted by the City Council at a regular meeting held December 5, 1928.

(Sgd.) J. M. Tyllia, Mayor.

Attest: Carrie Allen, City Clerk.

[fol. 40] EXHIBIT 2 TO BILL OF COMPLAINT

Articles of Incorporation of Northport Power and Light Company

Know all men by these presents that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming, and do hereby form, a corporation under the laws of the State of Washington, and hereby adopt the following Articles of Incorporation.

Article I

The name of this Corporation shall be and is: Northport Power and Light Company.

Article II

The Purposes for which this Corporations is formed are:

First, to buy, own, obtain, sell, generate, install, develop, distribute and delever any water, steam, electrical, gas or other power or heat; to buy, erect, maintain, operate, sell, dispose of and convey power plants, transmission lines, power stations and sub-plants; to obtain, buy, lease, own and hold municipal light and power franchises and buy plants, machinery, lines and appliances necessary to maintain and operate the same, and to sell and deliver to municipalities and to public and private corporations and private citizens, electrical current and other power for heat, power, lighting and other purposes.

Second, to locate, buy, obtain, own sell, lease and procure water rights and roads and highways, bridges, trails or other means for facilitating the erection and maintenance and operation of such power plants necessary and expedient for any of the purposes of this corporation.

Third, to buy, obtain, own lease and operate telephone and telegraph lines and plants, railroads and other lines of transportation and communication, and any necessary franchises therefor.

Fourth, to buy, obtain, own, sell and mortgage real estate and personal property and to borrow money in the name of the corporation and give notes, bonds, mortgages or other securities for same.

[fol. 41] Fifth, to locate, acquire, procure, take, hold, work, operate, bond, buy, lease, sell, convey and develop mines, metals and mineral claims of every description and kind within the State of Washington, the United States of America, British Columbia and elsewhere; to carry on and conduct a general min*gn*, smelting, milling and reduction business; to buy or otherwise acquire minerals, ores, plants, machinery, implements and all things capable of being used in connection with metallurgical operations or, any of the business of the corporation, and to sell, dispose of or convey the same, either the whole or any part thereof.

Sixth, to bond, buy, lease, locate, own and hold ditches, flumes and water rights; to construct, lease, buy, sell, build, own and operate railroads, ferries, tramways and other means for transporting ore, mechandise and passengers; to own, bond, buy, lease and locate timber claims; to own and hold stock in other corporations; to borrow, raise and secure the payment of money by mortgaging, selling, or leasing any or all of its real or personal property in such manner as may be for the best interest of the corporation; and finally, to do everything consistent, proper and requisite for the carrying out of the objects and purposes aforesaid, in their fullest and broadest sense, within the State of Washington, the United States of America and the Dominion of Canada.

Article III

The capitalization of this corporation shall be Two Hundred Thousand ($200,000) Dollars, divided into Two Hun-

dred Thousand ($200,000) fully paid shares of the par value of One ($1.00) Dollar each, of which, such portion as may be designated by by-law, if any shall be preferred stock, and the entire capital stock or the proceeds thereof, or any portion of same, may be used in the purchase and acquisition of property and property rights, consessions and interests necessary for the purpose of the corporation.

Article IV

The term for which this Corporation shall exist is fifty (50) years from and after the date of its incorporation.

[fol. 42]

Article V

The place where the principal business of this corporation shall be conducted is the town of Northport, Washington, and the corporation may have and maintain from time to time branch offices in other places in the United States and Canada, or elsewhere, as the board of trustees, by resolution, may determine and designate.

Article VI

The number of trustees who shall manage the affairs of this corporation shall be three (3), and the names and addresses of those who are hereby appointed as trustees to manage same during the first six months of its existance are: Lorne A. Campbell, Rossland, British Columbia; H. R. Williams, Coleville, Washington; O. C. Moore, Spokane, Washington.

Article VII

A majority of the whole number of trustees above designated shall form a quorum for the transaction of the company's business, and said board of trustees is hereby authorized and directed to formulate and adopt a set of by-laws, not inconsistent with these articles of incorporation, the Constitution of the United States, or the Constitution and laws of the State of Washington, to regulate the affairs of the corporation, and said board of trustees is in like manner authorized and empowered to revise, modify and amend said by-laws from time to time as conditions may require.

In witness whereof we have hereunto set our hands and seals in triplicate this 26th day of June, A. D. 1917.

Lorne A. Campbell (Seal), O. C. Moore (Seal).

[fol. 43] State of Washington,
County of Spokane, ss:

I, R. P. Woodworth, a Notary Public in and for the State of Washington, residing at Spokane, hereby certify that on this 26th day of June, A. D. 1917, personally appeared before me Lorne A. Campbell and O. C. Moore, to me known to be the individuals described in and who executed the foregoing and attached Articles of Incorporation, and acknowledged that they signed and sealed same in triplicate as their free and voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and official seal the day and year first above written.

R. P. Woodworth, Notary Public for the State of Washington, Residing at Spokane. (Seal R. P. Woodworth, Notary Public, State of Washington. Commission expires Dec. 10, 1919.)

No. 674. 37272

State of Washington,
County of Stevens, ss:

This certifies that this instrument was filed for record in the Auditor's office of said County on the 6th day of July, 1917, at 2 o'clock and 4 Min. P. M., at the request of O. C. Moore. Recorded in book — of records of Stevens County, Washington, on page —. 19—.

Earle T. Gates, Aud. of Stevens Co., Wash. Saluda Kildow, Deputy.

[File endorsement omitted.]

[fol. 44] In United States District Court

Motion for Injunction—Filed Sept. 9, 1929

Plaintiff moves that an injunction pendente lite be granted and issued in accordance with the prayer of the

complaint, and that a temporary restraining order be issued enjoining and restraining defendants with respect to the matters and things against which relief is prayed in the complaint pending, the hearing and determination of the application for an interlocutory injunction.

This motion is based upon the complaint herein.

W. Lon Johnson, O. C. Moore, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 45] In United States District Court

Notice of Motion for Injunction—Filed Sept. 9, 1929

To Roland H. Hartley, as Governor of the State of Washington, and John H. Dunbar, as Attorney General of the State of Washington:

Please take notice that on the bill of complaint in this action, copies of which are hereunto attached, the undersigned will move the court at the Federal Court room in the City of Tacoma on the 16th day of September, 1929, at ten o'clock A. M., or as soon thereafter as counsel can be heard, for an interlocutory injunction to restrain pendente lite the defendants, Roland H. Hartley and John H. Dunbar, or their agents or deputies, from instituting any suit or proceeding to escheat the property of the plaintiff located in the State of Washington used in foreign commerce, and for such other and further order as may be just.

Dated this 9th day of September, 1929.

W. Lon Johnson, O. C. Moore, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 46] In United States District Court

Temporary Restraining Order—Filed Sept. 9, 1929

The plaintiff appearing by O. C. Moore, one of its attorneys, and having duly filed herein a motion for an injunc-

tion pendente lite, and it appearing that the defendants have threatened and are about to institute a suit to escheat the property of the plaintiff to the State of Washington which the plaintiff claims to be illegal and void, and that such a suit to escheat the property of the plaintiff, if wrongful, would be an irreparable injury to the plaintiff in that it would deprive the plaintiff of its property within the State of Washington and compel it to cease business within the State of Washington, and that a temporary restraining order should be granted for the reason that defendants have threatened to seize the property of the plaintiff through escheat proceedings immediately and without any further notice to plaintiff, and the Court being fully advised in the premises;

It is ordered that the defendants, their agents or deputies, and each of them, do absolutely desist and refrain from instituting any proceedings in the courts against the plaintiff for the purpose of escheating to the State of Washington the property of the plaintiff used in its business as engaged [fol. 47] in foreign commerce, or from instituting or prosecuting any proceedings whatsoever for the purpose of escheating to the State of Washington any of the property of the plaintiff utilized in foreign commerce, upon the plaintiff first executing to the court a bond in the sum of one thousand dollars to be approved by the judge of this Court.

It is further ordered that defendants be and appear in the above entitled court on Monday, the 16 day of September, 1929 at the hour of ten o'clock A. M., then and there to show cause, if any there be, why a preliminary injunction restraining and enjoining the defendants from the acts aforesaid should not be granted, and why bond in a sum greater than the aforesaid sum should be required as a condition to the issuance of such preliminary injunction.

Done in open court this 9th day of September, 1929.

Frank H. Rudkin, Judge.

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

SUBPŒNA AND MARSHAL'S RETURN—Filed Sept. 11, 1929

The President of the United States of America to Roland H. Hartley, as Governor of the State of Washington, and John H. Dunbar, as Attorney General of the State of Washington, Defendants, Greeting:

You are hereby commanded that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Tacoma, Washington, on the twenty-ninth day of September, 1929, to answer a Bill of Complaint filed against you in said Court by Northport Power and Light Company, a corporation, plaintiff, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under penalty of the law.

Witness, the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Tacoma, Washington, this 9th day of September, 1929.

Ed M. Lakin, Clerk, by E. Redmayne, Deputy Clerk. (Seal).

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

You are hereby required to file your Answer or other defense in the above-mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

Ed M. Lakin, Clerk, by E. Redmayne, Deputy. (Seal.)

[fol. 49] Marshal's Return

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with Roland H. Hartley, as Governor of the State of Washington, and John H. Dunbar, as Attorney General of State of Washington.

E. B. Benn, United States Marshal, by L. Holtz, Deputy.

September 10, 1929.

Fees: $5.92.

[fol. 50] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed Sept. 17, 1929

Come now the defendants, Roland H. Hartley, as governor of the state of Washington, and John H. Dunbar, as attorney general of the state of Washington, and move the court to dismiss the bill of complaint filed herein for the reasons and upon the grounds that, as appears upon the face thereof;

1. Said bill of complaint does not state any matters of equity entitling the plaintiff to the relief prayed for;

2. Said bill of complaint does not state facts sufficient to entitle plaintiff to any relief against these defendants or either of them;

3. The plaintiff has a plain, adequate and complete remedy at law.

Wherefore defendants pray the judgment of this court whether they shall further answer and that they be dismissed with their costs.

John H. Dunbar, Attorney General; Jno. A. Homer, Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT.

MEMORANDUM OPINION UPON APPLICATION FOR INTERLOCUTORY INJUNCTION UNDER SECTION 266, JUDICIAL CODE, AND MOTION TO DISMISS THE BILL OF COMPLAINT—Filed Oct. 14, 1929

Plaintiff, a corporation organized under the laws of the State of Washington, a majority of whose issued capital stock is owned by an alien corporation, alleging that Section 33, of Article II of the Constitution of the State of Washington violates, as to Plaintiff, provisions of the Constitution of the United States, prays that the Defendants—

the Governor and Attorney General of such State—be enjoined from bringing any proceeding for the purpose of enforcing such section or certain of the enactments of the Legislature for the purpose of carrying out such constitutional provision.

This cause was heard upon Motion for Interlocutory Injunction and Motion to Dismiss the Bill of Complaint.

It is alleged in the Bill of Complaint that the Plaintiff has been, since the year 1917, the owner of certain right of way easements and franchises in the State of Washington on which rights-of-way there have been constructed its transmission lines and power stations for the purpose of conveying electrical energy from a point north of the International Boundary Line in British Columbia to points in the State of Washington; which right-of-way easements and franchises are necessary for that purpose; that Plain-
[fol. 52] tiff purchases all of its electrical energy from the West Kootenay Power and Light Company, Ltd., a corporation of Canada, and transmits the same from British Columbia over transmission lines to consumers in the town of Northport, in the State of Washington; that Plaintiff has a franchise from such town authorizing it to sell and distribute electrical energy to the inhabitants thereof and that it has, at all times since 1917, been engaged in selling and distributing electrical current generated in the Dominion of Canada and transmitted across the International Boundary Line into the State of Washington for the purpose of such sale and distribution.

Section 33, Article II of the Constitution of the State of Washington (1 Remington's Compiled Statutes of Washington, 1922, page 68) provides:

"Sec. 33. Ownership of Lands by Aliens Prohibited—Exceptions.—The ownership of lands by aliens, other than those in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of land hereafter made to any alien directly, or in trust for such alien, shall be void; Provided, that the provisions of this section shall not apply to lands containing valuable deposits of min-

erals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

Section 1, Chapter 50, Session Laws of 1921, State of Washington (Sec. 10581, Remington's Compiled Statutes of Washington, 1922, Vol. 3, provides:

* * * * * * *

"(a) 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a major-[fol. 53] ity of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

(b) 'Land' does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen;

* * * * * * *

(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is encluded;"

Section 2, Chapter 50, Session Laws of 1921, State of Washington (Section 10582, Remington's Compiled Statutes of Washington, 1922, Vol. 3) provides:

* * * * * * *

"An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the Constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the Constitution or of this act shall thereby be forfeited to and become the property of the state."

Section 8, Chapter 50, Session Laws of 1921, State of Washington, (Section 10588, Remington's Compiled Statutes of Washington, 1922, Vol. 3) provides:

"* * * It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement."

Section 9, Chapter 50, Session Laws of 1921, State of Washington. (Section 10589, Remington's Compiled Statutes of Washington, 1922, Vol. 3) provides:

"* * * Proverty forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly."

[fol. 54] It is alleged in the Complaint that the Defendants have threatened to and will enforce said act against the Plaintiff because of the fact that the majority of the capital stock of the Plaintiff corporation is owned by an alien, and will forfeit or attempt to forfeit all of said leasehold interests and franchises and the whole thereof and all the improvements thereon, and will attempt to escheat the same to the State of Washington, by the institution and prosecution of a suit at law in the Courts of Washington, as a result of which Plaintiff will suffer great and irreparable loss and damage.

W. Lon Johnson, Colville, Washington, and O. C. Moore, 501 Peyton Bldg., Spokane, Washington, Attorneys for Plaintiff.

John H. Dunbar, Attorney General of Washington, Olympia, Wn.; Jno. A. Homer, Ass. Attorney General of

Temple of Justice, Olympia, Wn., Attorneys for Defendants.

Plaintiff cites Section 266, Judicial Code; Section 33, Article II, Constitution of the State of Washington; Section 4, Chapter 50, Session Laws of 1921, State of Washington (Sec. 10582, Remington's Compiled Statutes of Washington, 1922, Vol. 3); Section VIII, Article I, Constitution of the United States; Section X, Article I, Constitution of the United States; Section I, 14th Amendment, Constitution of the United States; Commerce Treaty of 1815 between United States and Great Britain; Smyth vs. Ames, 169 U. S. 466, 478 (42 L. Ed. 819, 938); Risty vs. C. R. I. & P. *Rco.*, 270 U. S. 378, 388 (70 L. Ed. 642-650); Terrace vs. Thompson, 263 U. S. 197, 214 (68 L. Ed. 255-274); Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 12 (43 L. Ed. 341, 346); [fol. 55] Adams vs. Tanner, 244 U. S. 590, 592 (61 L. Ed. 1336, 1342); Truax vs. Raich, 239 U. S. 33, 37 (60 L. E. 131, 133); Rast vs. Van Deman & Lewis Co., 240 U. S. 342, 355 (60 L. Ed. 679, 686); Kennington vs. Palmer, 255 U. S. 100 (65 L. Ed. 528); Ex parte Young, 209 U. S. 126, 153 (62 L. Ed. 714, 730); Foster-Franklin Packing Co. vs. Haydell, 278 U. S. 1 (73 L. Ed. 1, 5); Ohio Oil Co. vs. Conway, 73 L. Ed. 294, 295; Liggett Co. vs. Baldridge, 278 U. S. 105 (73 L. Ed. 45); State Ex rel Dunbar vs. Shokuta, 131 Wash. 291, 293; State vs. Hirabayashi, 139 Wash. 696, 699; Siler vs. Louisville & N. R. Co., 213 U. S. 175, 195 (53 L. Ed. 753, 757); Ohio Tax Cases, 232 U. S. 576, 586 (58 L. Ed. 738, 743); Greene vs. Louisville & I. R. Co., 244 U. S. 499, 508 (61 L. Ed. 1280, 1286); United Fuel & Gas Co. vs. Railroad Commission, 73 L. Ed. 104, 106; City of Dayton vs. City Ry. Co., 16 Fed. (2d) 401, 403; State vs. Natsuhara, 136 Wash. 436, 444; State vs. Matomatsu, 139 Wash. 639; 19 Corpus Juris 865, 866 and cases cited in Notes 50, 51; 9 R. C. L. 737; Branan vs. Wimsatt, 298 Fed. 833, 836; Stovall vs. Coggins Granite Co., 42 S. E. 723, 724; Ernst vs. Allen, et al., 184 Pac. 827, 839; Waller vs. Hildebrecht, 128 N. E. 807, 809; Kershaw vs. Burns, 74 S. E. 378, 379; 33 Cyc. 169; Reichenbach vs. Washington Short Line R. Co., 10 Wash. 357 (38 Pac. 1126); Knapp vs. Crawford, 16 Wash. 524; Spokane vs. Colby, 16 Wash. 610; Pacific Iron Works vs.

Bryant Lumber Co., 60 Wash. 502 (111 Pac. 578); Neitzel vs. Spokane International R. Co., 65 Wash. 100; Boatman vs. Lasley, 23 Oh. St. 614; Stockdale vs. Yerden, 190 N. W. 225; State ex rel. Winston vs. Morrison, 18 Wash. 664; Myers vs. Arthur, 135 Wash. 583; Salisbury vs. Alskog, 144 Wash. 88; Humphrey vs. Grutz, 77 Wash. 152, 157; Columbua etc. Co. vs. Columbua, 249 U. S. 399 (63 L. Ed. 669, 676); Section 12, Article I, Constitution of the State of Washington; Thompson on Corporations (3d) Sec. 2184, 2185, [fol. 56] *2185* and 2188; Frost vs. Railroad Commission, 271 U. S. 583, 596 (71 L. Ed. 1101, 1106); Williams vs. Standard Oil Co., 73 L. Ed. 141, 143; Quaker City Cab Co. vs. Penn., 277 U. S. 389, 400 (72 L. Ed. 927, 929); Public Utilities Comm. vs. Attleboro Steam & E. Co., 273 U. S. 83, 86 (71 L. Ed. 549, 552); Simpson vs. Shepard, 230 U. S. 352, 396 (57 L. Ed. 1511, 1540); Gibbons vs. Ogden, 9 Wheat. 22 U. S. 1-240; Gloucester Ferry Co. vs. Penn., 114 U. S. 196, 204 (29 L. Ed. 158, 162); Penn. vs. West Virginia, 262 U. S. 553, 596 (67 L. Ed. 1117, 1132); Dahnke-Walker Mills Co. vs. Bondurant, 257 U. S. 282, 291 (66 L. Ed. 239, 244); Shafer vs. Farmers Grain Co., 268 U. S. 196, 200 (69 L. Ed. 908, 915); Foster Fountain Pack. Co. vs. Haydel, 73 L. Ed. 1, 4); Anderson vs. Shipowners Asso., 272 U. S. 359, 363 (71 L. Ed. 298, 301); Hammer vs. Dagenhart, 247 U. S. 251, 269 (62 L. ed. 1101, 1105); South Carolina vs. Georgia, 93 U. S. 4 (23 L. Ed. 782); Mondou vs. N. Y. Etc. R. Co., 223 U. S. 1, 47, 49 (56 L. Ed. 327, 345, 346); Smith vs. Alabama, 124 U. S. 465, 473 (31 L. Ed. 508, 510); Di Santo vs. Penn., 273 U. S. 34, 37 (71 L. Ed. 524, 526); Penn Gas Co. vs. Public Service Comm., 252 U. S. 23, 27 (64 L. Ed. 434, 441); Interstate Commerce Comm. vs. Ill. C. R. Co., 215 U. S. 452, 474 (54 L. Ed. 280, 289); Ozark Pipe Corp. vs. Menier, 266 U. S. 555, 565 (69 L. Ed. 439, 443); Luckenbach S. S. Co. vs. Denney, 278 Pac. 419, 422; Mich. Public Utilities Comm. vs. Duke, 266 U. S. 570 (69 L. Ed. 445); Philadelphia etc. S. S. Co. vs. Penn., 122 U. S. 326 (30 L. Ed. 1200); Lemke vs. Farmers Grain Co., 258 U. S. 50, 59 (66 L. Ed. 458, 464); Meyer vs. Neb., 262 U. S. 390, 400 (67 L. Ed. 1042, 1045); Washington ex rel. vs. Kuykendall, 275 U. S. 207, 211 (72 L. Ed. 241, 275); Hastings vs. Anacortes Packing Co., 29 Wash. 224, 230; 1st Malloy's Comp., Page 624 (1815 Treaty

[fol. 57] between United States and Great Britain); Ohio ex rel Clarke vs. Deckenbach, 274 U. S. 392 (71 L. Ed. 1115); Jordan vs. Tashire, 73 L. Ed. 36; Terrace vs. Thompson, 263 U. S. 197, 217 (68 L. Ed. 255, 275); Webb vs. O'Brien, 263 U. S. 313, 322 (68 L. Ed. 318, 321); South Carolina vs. United States, 199 U. S. 437, 451 (50 L. Ed. 261, 265); Lewis Publishing Co. vs. Morgan, 229 U. S. 288, 314 (57 L. Ed. 1190, 1203); Dillon vs. Gloss, 256 U. S. 368, 373 (65 L. Ed. 994, 996); Cherokee National vs. Kans. Railway Co., 135 U. S. 641, 656.

Defendants cite: Section 384, United States Code; Boise Artesian Water Co. vs. Boise City, 213 U. S. 276; Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481; Dalton Adding Machine Co. vs. Virginia, 236 U. S. 699; Cavanaugh vs. Looney, 248 U. S. 453; Section 33, Article II, Constitution of the State of Washington; Chapter 50, Session Laws of 1921, State of Washington; Humphrey vs. Krutz, 77 Wash. 152 at 157; Cook vs. The C. B. & Q. Rco. 40 Ia. 451; Goodrich vs. Burbank, 12 Allen's reports, at page 460; Standard Oil Co. vs. Buchi, 66 Atl. 427 (N. J.); Tidewater Pipe Co. vs. Bell, 124 Atl. 351 (Penn.); Terrace vs. Thompson, 263 U. S. 197; 1 R. C. L. 806; Webb vs. O'Brien, 263 U. S. 313, 322.

Before Frank S. Dietrich, Circuit Judge, and George M. Bourquin and Edward E. Cushman, District Judges

Cushman, District Judge:

Of the questions presented it will only be necessary to consider whether Plaintiff has an adequate remedy at law and in the determination of this question we are not required to consider whether the proceeding by the Attorney General, sought to be enjoined, is one of forfeiture or [fol. 58] escheat. Bouvier's Law Dictionary (Rawle's Third Edition), page 1069; 2 Blackstone's Commentaries 251.

It in no way has been made to appear that the remedy at law afforded Plaintiff in such a proceeding is not adequate. The determination of the question is controlled by Boise Artesian Water Co. vs. Boise City, 213 U. S. 276 and Cavanaugh et al. vs. Looney, 248 U. S. 453, in which latter case it was said at page 456:

"Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceeding;"

It is true that the jurisdiction of the District Court was upheld in Terrace et al. vs. Thompson, 263 U. S. 197 and in Webb vs. O'Brien, 263 U. S. at 313, but in each of those cases an interest in the real estate had not yet been acquired by the alien. In the first of the last cited decisions it is also stated, at page 212:

"* * * and it is alleged that the defendant, as Attorney General, has threatened to and will * * * if they enter into such lease, * * * prosecute the appellants criminally for violation of the act; that the act is so drastic and the penalties attached to its violation are so great that neither of the appellants may make the lease even to test the constitutionality of the act, and that, unless the court shall determine its validity in this suit, the appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of their property without due process of law and denied the equal protection of the laws."

There is no allegation in the Complaint now before the Court in any way equivalent to the above. The Motion for an Interlocutory Injunction is denied. The Defendant's Motion to Dismiss the Bill of Complaint is granted.

Frank S. Dietrich, Circuit Judge. Geo. M. Bourquin, District Judge. Edward E. Cushman, District Judge.

[fol. 59] [File endorsement omitted.]

[fols. 60-65] Petition for Rehearing covering six pages, filed November 2, 1929, omitted from this print. It was denied and nothing more by order November 23, 1929.

[fol. 66] IN UNITED STATES DISTRICT COURT

ORDER DENYING REHEARING—Filed Nov. 23, 1929

The petition of the Plaintiff for a re-hearing filed herein is denied.

Frank S. Dietrich, U. S. Circuit Judge. Geo. M. Bourquin, U. S. District Judge. Edward E. Cushman, U. S. District Judge.

[File endorsement omitted.]

[fol. 67] IN UNITED STATES DISTRICT COURT

JUDGMENT AND DECREE OF DISMISSAL—Filed Dec. 28, 1929

This matter having heretofore come regularly on for hearing before Hon. Frank S. Dietrich, circuit judge, Hon. George M. Bourquin and Hon. Edward E. Cushman, district judges, upon motion of plaintiff for an interlocutory injunction and the motion of defendants to dismiss the bill of complaint, and the court having heard the argument of counsel and having heretofore entered its memorandum opinion herein and having denied the plaintiff's petition for rehearing, and being now fully advised in the premises, in accordance with said memorandum decision, and upon the grounds that the court has no jurisdiction of this action because it appears from the complaint herein that plaintiff has a plain, adequate and complete remedy at law in the premises, it is

Ordered, adjudged and decreed (1) that plaintiff's motion for an interlocutory injunction be and the same hereby is denied; (2) that defendant's motion to dismiss the bill of complain- be and the same hereby is granted; (3) that this action be and the same hereby is dismissed; and (4) that defendants do have and recover of and from plaintiff their costs to be hereinafter taxed.

Done in open court this — day of December, 1929.

Frank S. Dietrich, Circuit Judge. Geo. M. Bourquin, District Judge. Edward E. Cushman, District Judge.

O. K. as to form. O. C. Moore.

[File endorsement omitted.]

[fol. 68] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Feb. 4, 1930

Comes now the Northport Power and Light Company, a corporation, plaintiff in said cause, and files the following Assignment of Errors on which it will rely on its appeal from the judgment and decree filed and entered in the above cause on the 28th day of December, 1929.

I

The court erred in denying the motion of plaintiff, Northport Power and Light Company, for an interlocutory injunction.

II

The court erred in not granting and in refusing to grant the motion of plaintiff, the said Northport Power and Light Company, for an interlocutory injunction.

III

The court erred in granting defendant's motion to dismiss the bill of complaint.

IV

The court erred in dismissing said above entitled cause.

V

The court erred in awarding judgment to defendants for their costs in said cause.

VI

The court erred in deciding and holding that plaintiff had and has a plain, adequate and complete remedy at law.

[fol. 69] VII

The court erred in holding that it had no jurisdiction of this action.

VIII

The court erred in declining to exercise jurisdiction in and over said cause.

IX

The court erred in refusing to hold and declare Chapter 50 of the 1921 Session Acts of the State of Washington, ineffective, inoperative, inapplicable and void in so far as by its terms said statute may apply or be thought to apply to or restrict or limit the rights and interests of plaintiff alleged and described in the complaint, as and because in conflict with (a) the Due Process Clause, Sec. III; (b) the Equal Protection Clause, Sec. XII; and (c) the Contract Clause, Sec. XXIII of Art. I of the Constitution of the State of Washington.

X

The court erred in not holding and in refusing to hold and decide that the threatened action and legal proceedings by defendants for the escheat and forfeiture of the properties, rights and interests of plaintiff, as alleged in the complaint, would be in violation of that provision of Sec. 33, Art. II of the Constitution of the State of Washington, excepting from the general provision of said section against alien ownership the necessary land for mills and machinery to be used in the development and manufacture of products from alien owned lands containing valuable minerals, metals, iron, coal or fire clay.

XI

The court erred in refusing to hold and declare Sec. 33 of Art. II of the Constitution of the State of Washington, ineffective, inoperative, inapplicable and void in so far as by its terms said section may apply or be thought to apply to [fol. 70] or restrict or limit the rights and interests of plaintiff alleged and described in the complaint, as and because in conflict with (a) the Commerce Clause, Sec. VIII, Art. I; (b) the Contract Clause, Sec. X, Art. I; (c) the Due

Process Clause of Sec. I of the 14th Amendment; and (d) the Equal Protection Clause of Sec. I of the 14th Amendment to the Constitution of the United States.

XII

The court erred in refusing to hold and declare Chapter 50 of the 1921 Session Acts of the State of Washington ineffective, inoperative, inapplicable and void in so far as by its terms said statute may apply or be thought to apply to or restrict or limit the rights and interests of plaintiff alleged and described in the complaint, as and because in conflict with, (a) the Commerce Clause, Sec. VIII, Art. I; (b) the Contract Clause, Sec. X, Art. I; (c) the Due Process Clause of Sec. I of the 14th Amendment; and (d) the Equal Protection Clause of Sec. I of the 14th Amendment to the Constitution of the United States.

XIII

The court erred in refusing to hold and declare Sec. 33 of Art. II of the Constitution of the State of Washington ineffective, inoperative, inapplicable and void in so far as by its term said section may apply or be thought to apply to or restrict or limit the rights and interests of plaintiff alleged and described in the complaint, as and because in conflict with the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

XIV

The court erred in refusing to hold and declare Chapter 50 of the 1921 Session Acts of the State of Washington ineffective, inoperative, inapplicable and void in so far as by its terms said section may apply or be thought to apply to [fol. 71] or restrict or limit the rights and interests of plaintiff alleged and described in the complaint, as and because in conflict with the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

W. Lon Johnson and O. C. Moore, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

PETITION FOR ALLOWANCE OF APPEAL—Filed Feb. 4, 1930

The above named, Northport Power and Light Company, a corporation, feeling itself aggrieved by the judgment and decree of dismissal filed and entered in the above entitled cause on the 28th day of December, 1929, (1) denying the motion of said Northport Power and Light Company for an interlocutory injunction in said cause; (2) granting defendants' motion to dismiss the bill of complaint; (3) dismissing the above entitled cause; and (4) awarding judgment to defendants for their costs herein, does hereby appeal from said judgment and decree to the Supreme Court of the United States and prays that this its appeal may be allowed for the reasons specified in the assignment of errors filed herewith, and that a transcript of the record and proceedings in said cause and all things concerning the same upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed by said Northport Power and Light Company may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal to be made.

W. Lon Johnson and O. C. Moore, Solicitors for Petitioner.

[fol. 73] [File endorsement omitted.]

[fol. 74] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL—Filed Feb. 4, 1930

On reading the petition of the above named plaintiff in the above entitled cause, for the allowance of an appeal to the Supreme Court of the United States from the judgment and decree filed and entered in said cause on December 28,

1929, (1) denying the motion of plaintiff for an interlocutory injunction in said cause; (2) granting defendant's motion to dismiss the bill of complaint; (3) dismissing the above entitled cause; and (4) awarding judgment to defendants for their costs herein, it is ordered that the appeal be and is hereby allowed and it is further ordered that the plaintiff execute and file in the office of the Clerk of the above named court, a bond on appeal, conditioned according to law, in the sum of two hundred fifty no/100 dollars, with good and sufficient surety to be approved by the undersigned.

Done in open court this 4th day of February, 1930.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fols. 75 & 76] Bond on appeal for $250.00, approved and filed February 5, 1930, omitted in printing.

[fols. 77 & 78] Citation, in usual form, showing service on John Dunbar and Jno. A. Homer, filed February 5, 1930, omitted in printing.

[fol. 79] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD ON APPEAL—Filed Feb. 5, 1930

To the Clerk of the above-entitled Court:

Please make and certify an appeal to the Supreme Court of the United States a record which includes the following files, to-wit:

1. Bill of Complaint and attached Exhibits.
2. Motion for Injunction.
3. Notice of Motion for Injunction.
4. Temporary restraining order.
5. Subpœna and Marshal's return thereto.
6. Motion of Defendant's to Dismiss Bill of Complaint.
7. Opinion filed October 14, 1929, on plaintiff's applica-

tion for interlocutory injunction and defendant's motion to dismiss.

8. Petition for re-hearing.

9. Order denying petition for re-hearing.

10. Judgment and decree denying interlocutory injunction and dismissing the bill of complaint.

11. Assignment of errors.

12. Petition for allowance of appeal.

13. Order allowing appeal and fixing amount of bond on appeal.

14. Bond on appeal.

15. Citation.

16. Acceptance of Service.

17. This præcipe with acceptance of service thereof.

W. Lon Johnson and O. C. Moore, Solicitors for Plaintiff.

[File endorsement omitted.]

[fols. 80 & 81] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 82] In Supreme Court of the United States

Statement of Points Relied Upon and Designation to Print Entire Record—Filed April 4, 1930

I

In compliance with Rule 13, Paragraph 9, of this Court, appellant hereby adopts and designates the Assignments of Error filed in and on its behalf in the District Court, as and for a definite statement of the points upon which it intends to rely on said appeal in this Court.

II

Appellant hereby designates the entire record transmitted to this Court from the District Court as necessary

for consideration as the points on which it intends to rely in this Court and requests that same be printed.

W. Lon Johnson and O. C. Moore, Solicitors for Appellant.

Service of the above statement, by delivery of a copy thereof, hereby admitted this 25 day of March, A. D. 1930.

John H. Dunbar, John A. Homer, Solicitors for Defendants and Appellees.

[fols. 83-86] [File endorsement omitted.]

Endorsed on cover: File No. 34,894. W. Washington D. C. U. S. Term No. 763. Northport Power and Light Company, appellant, vs. Roland H. Hartley, as Governor of the State of Washington, and John H. Dunbar, as Attorney General of the State of Washington. Filed March 26, 1930. File No. 34,894.

FILE COPY

FILED
APR 15 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1929

NORTHPORT POWER & LIGHT COMPANY, a corporation, *Appellant*,
vs.
ROLAND H. HARTLEY, as Governor of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington, *Appellees*.

No. 66

APPEAL FROM JUDGMENT AND DECREE OF UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, DENYING INTERLOCUTORY INJUNCTION AND DISMISSING BILL OF COMPLAINT.

STATEMENT OF APPELLANT UNDER RULE 12, REVISED RULES.

W. LON JOHNSON,
Colville, Washington,
O. C. MOORE,
Spokane, Washington,
Solicitors for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1929

NORTHPORT POWER & LIGHT COMPANY, a corporation, *Appellant*,

vs.

ROLAND H. HARTLEY, as Governor of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington, *Appellees*.

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Solicitors for Appellant.

IN THE

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OCTOBER TERM, 1929

NORTHPORT POWER & LIGHT COMPANY, a corporation, *Appellant*,

vs.

ROLAND H. HARTLEY, as Governor of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington, *Appellees*.

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STATEMENT OF APPELLANT UNDER RULE 12, REVISED RULES.

In compliance with Rule 12, of the Revised Rules, appellant presents herewith its statement of basis of jurisdiction for review by the Supreme Court on appeal of the judgment and decree below.

JURISDICTION.

(a) The jurisdiction of this Court is invoked under Sec. 266 of the Judicial Code, U. S. C., Title 28, Sec. 380, for the review of the judgment and decree of a three judge court, assembled pursuant to said statute, whereby an interlocutory injunction was denied and the suit dismissed.

JUDGMENT AND PROCEEDINGS BELOW.

(b) The judgment and decree, a review of which is sought, was entered on December 28th, 1929 (Rec., p 67), and the application for the appeal was presented and allowed on the 4th day of February, 1930 (Rec., p 74).

NATURE OF CASE.

(c) It was sought by this suit to restrain the Governor and Attorney General of the State of Washington from instituting and prosecuting escheat and forfeiture proceedings under Sec. 33, Art. 2, of the Constitution of the State of Washington, and Sec. 1, Chapter 50 of 1921 Session Laws of the State of Washington; Sec. 10582, Remington's Compiled Statutes, Vol. 3.

The bill of complaint (Rec., p 2) alleges, that appellant, Northport Power & Light Company, is a corpora-

tion under the laws of the State of Washington and that the majority of its issued stock is owned by the West Kootenay Power & Light Company, Ltd., of Canada, an alien corporation; that appellant is engaged in the transmission of electrical current, purchased in the Dominion of Canada, from a point in the Province of British Columbia across the International Boundary Line into the State of Washington, where it is sold and distributed to the inhabitants of the Town of Northport in that State, pursuant to a franchise from said Town of Northport, and to other distributes in said State, also that it is engaged in the development of mining properties owned by it in Stevens County, Washington, in which development it requires and uses electrical energy; that plaintiff is and since the year 1917, has been the owner of certain right-of-way easements and franchises within the State of Washington on which are located its transmission lines and power station used in conveying electrical current, so purchased in and transmitted from the Dominion of Canada, across the International Boundary Line into the State of Washington for distribution and sale to consumers in that State, and that all of said easements and franchises are necessary instruments in the transmission of said electrical current in foreign commerce, and are necessary to the continuation of plaintiff's said business; that Art. 11, Sec. 33, of the Constitution of

the State of Washington purports by its terms to prohibit the ownership of lands by aliens, other than mineral and the necessary land for mills and machinery to be used in the development of mineral lands and the manufacture of products therefrom, and by its terms makes every corporation, the majority of the capital stock of which is owned by aliens, an alien for the purposes of such prohibition; that in 1921 the legislature of the State of Washington enacted Chapter 50 of the 1921 Session Acts of that State, Sec. 10581 et sec. of Remington's Compiled Statutes of the State of Washington, same being in the nature of an enforcement act and adding by its terms to the inhibitions against alien ownership contained in the Constitution.

Sec. 33, of Art. II, of the Constitution of Washington is as follows:

> "The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this State, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void; Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital

stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

The complaint also alleges that because of the fact that the majority of the capital stock of plaintiff corporation is alien owned, defendants, as Governor and Attorney-General respectively of the State of Washington, have threatened to enforce and unless restrained by order of Court will enforce against plaintiff the aforesaid constitutional and statutory provisions of the State of Washington, and will forfeit and escheat and attempt to forfeit and escheat the aforesaid easements and leaseholds upon which are located plaintiff's transmission lines and power station and all of the improvements thereon, likewise its franchise, to the State of Washington, and that they will institute and prosecute legal proceedings in the Courts of Washington for that purpose; that in consequence, unless restrained by decree of the Court, plaintiff's business and the foreign commerce in which it is engaged will be irreparably injured, damaged and destroyed.

The complaint further alleges that said provision of the Constitution of Washington and said Act of the legislature, and the enforcement thereof by defendants against this plaintiff and its said property, are and would be in contravention of and repugnant to Clause 3, Sec. 8, Art. I, of the Constitution of the United States, empowering Congress to regulate commerce

with foreign nations; likewise, Sec. 10, Art. I of the Constitution providing that

> "* * * no state shall * * * pass any laws * * * impairing obligations of contracts;"

likewise, the Due Process and Equal Protection Clauses Sec. 1 of the 14th Amendment, to the Federal Constitution; likewise, the 1815 Commerce Treaty between the United States and Great Britain as extended and continued by the Treaty of 1827; also, that plaintiff has no adequate remedy at law.

The complaint also alleges and claims the protection of the following provisions of Art. I of the Constitution of the State of Washington, viz., Sec. 3, providing that no person shall be deprived of life, liberty or property without due process of law; Sec. 12, providing that

> "No law shall be passed granting to any citizen, class of citizens, or corporations, other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporation";

and Sec. 23, inhibiting the enactment of any law impairing the obligation of contracts.

The issuance of a temporary restraining order and an interlocutory injunction, and that on final hearing same be made perpetual, is prayed by the complaint.

A temporary restraining order was issued, returnable on the 16th day of September, 1929 (Rec., p 46). On the return day a motion to dismiss on the following grounds:

1. Said bill of complaint does not state any matters of equity entitling the plaintiff to the relief prayed for;

2. Said bill of complaint does not state facts sufficient to entitle plaintiff to any relief against these defendants or either of them;

3. The plaintiff has a plain, adequate and complete remedy at law;

was interposed by defendants (Rec., p 50), and argued to the Court.

On October 14th, 1929, an opinion was filed (Rec., p 51; 35 Fed. (2d) 199), denying the motion for an interlocutory injunction and granting defendant's motion to dismiss the bill of complaint, on the ground that it had not been made to appear that in the threatened proceeding for the enforcement of the aforesaid provision of the Constitution of Washington, and subsequent statute, plaintiff would not be afforded an adequate remedy for the protection of its rights.

Plaintiff thereafter petitioned for a rehearing (Rec., p 60), on the denial of which (Rec., p 66), on December 28th, 1929, a judgment and decree was entered

(Rec., p 67), denying the motion for an interlocutory injunction and dismissing said cause, with costs to defendants, as stated therein,

> "* * * upon the ground that the court has no jurisdiction of this action because it appears from the complaint herein that plaintiff has a plain, adequate and complete remedy at law in the premises * * *."

From said judgment and decree this appeal is prosecuted. (Rec., p 72.)

CASES SUSTAINING JURISDICTION.

(d) The following cases are believed to sustain the jurisdiction of this Court.

Smith vs. Wilson, 273 U. S. 388, 71 L. Ed. 699;

Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199;

Lawrence vs. St. Louis-San Francisco Ry. Co., 274 U. S. 588, 71 L. Ed. 1219;

Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 71 L. Ed. 1297;

Inter-State Busses Corp. vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551;

Foster-Fountain Pack. Co. vs. Haydel, 278 U. S. 1, 73 L. Ed. 1;

Herkness vs. Irion, 278 U. S. 92, 73 L. Ed. 198;

Ohio Oil Co. vs. Conway, 279 U. S. 813, 73 L. Ed. 972.

Respectfully submitted,

W. LON JOHNSON,

O. C. MOORE,

Solicitors for Appellant.

FILE COPY

FILED
SEP 18
CHARLES ELMORE

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1930

NORTHPORT POWER AND LIGHT COMPANY, a corporation,
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vs.
ROLAND H. HARTLEY, as Governor of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington,
Appellees.

No. 66

Appeal from the District Court of the United States for the Western District of Washington

BRIEF OF APPELLANT

W. LON JOHNSON,
Colville, Wash.,
and
O. C. MOORE,
Spokane, Wash.,
Attorneys for Appellant.

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Attorneys for Appellant.

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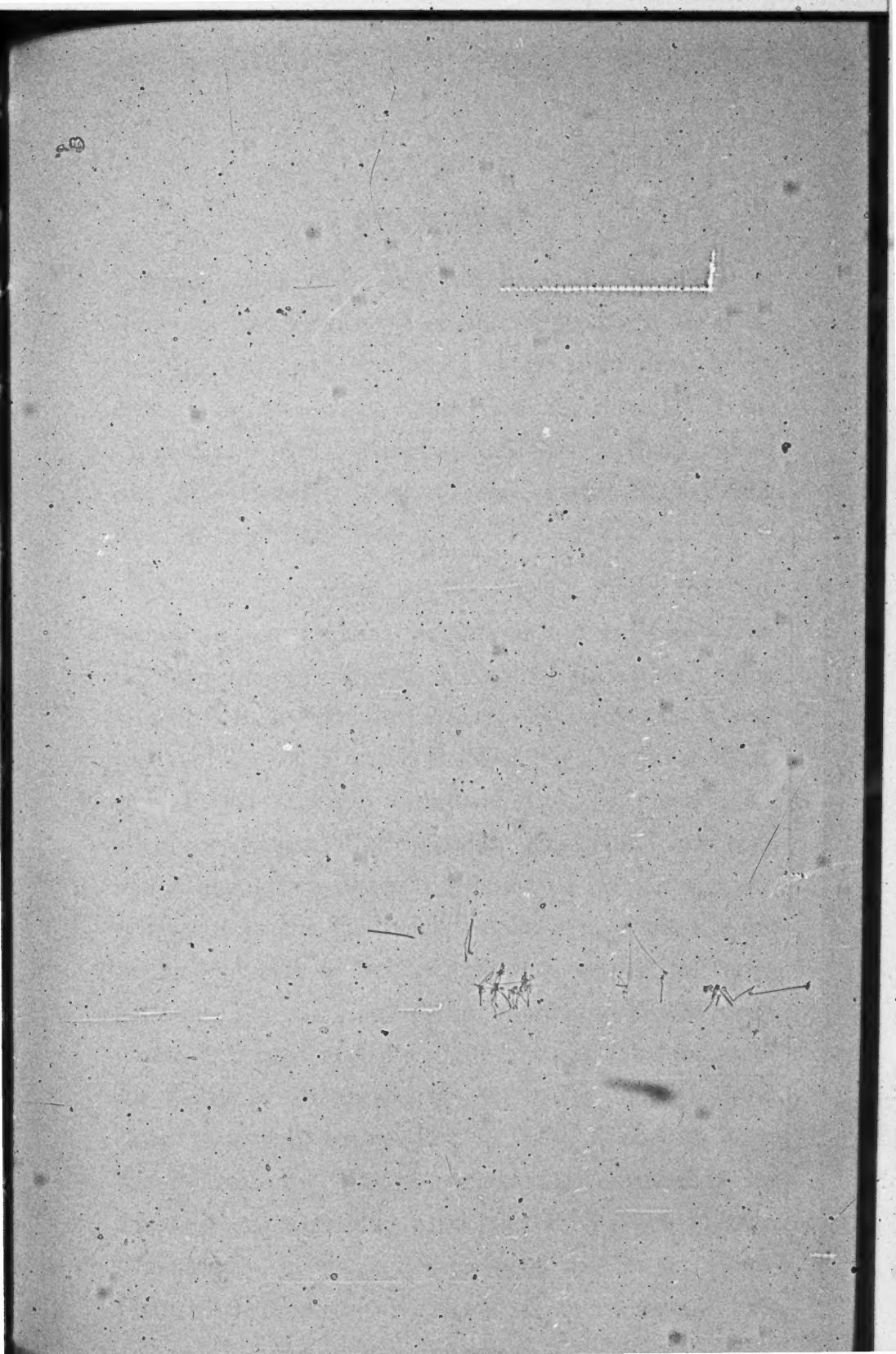

STATEMENT

Appellant seeks by this suit to enjoin appellees, as Governor and Attorney-General, respectively, from instituting escheat proceedings for the forfeiture of its property to the state, under Sec. 33, Art. II of the Constitution of Washington and Sec. I, Chap. 50 of the 1921 Session Laws of that state; Sec. 10582, Rem. Comp. Stat., Vol. 3.

The bill of complaint (Rec. p. 1) shows that appellant is a corporation organized and existing under the laws of Washington, a copy of its articles being attached as an exhibit (Rec. p. 48), and that a majority of its issued stock is owned by the West Kootenay Power & Light Company, Ltd., of Canada, an alien corporation; that appellant since 1917 has been and is engaged in the transmission of electric current, generated in the Dominion of Canada, from a point in the Province of British Columbia across the International Boundary into the State of Washington, where it is sold and distributed to the inhabitants of the Town of Northport in that state, under a franchise from said town (Rec. p. 42-47), and to other distributees; also, that it owns and is engaged in the development of mining properties in Stevens County, Washington, in which development, and in the manufacture of products therefrom, it requires and uses

a part of said electric energy; that appellant since 1917 has been and is the owner of certain right-of-way easements and franchises in the State of Washington, copies of deeds being attached as exhibits (Rec. p.7-42), on which are located its transmission lines and power station used in conveying and distributing in the State of Washington, the electric current so transmitted from Canada; that all of said easements and franchises are necessary instruments in the transmission and distribution of said electric current in foreign commerce and are necessary to the continuation of appellant's business.

Sec. 33, Art. II of the Constitution of Washington, reads:

> "The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this State, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. *Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.*" (Italics ours.)

The State of Washington in 1921 enacted a statute, supplemental to and somewhat broader than the above constitutional provision, Chap. 50 of the 1921 Session Acts, being Sec. 10581, et. seq. of Rem. Comp. Stat. of Washington, set out in full as Appendix I hereto.

Section 3852 of Rem. Comp. Stat. of Washington, set out in full as Appendix II, provides on the other hand in part as follows:

> "Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized * * * to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation. * * *.

Article II of appellant's articles of incorporation (Rec. p. 48) indicates that it was formed for the following, among other, purposes:

> "First, to buy, own, obtain, sell, generate, install, develop, distribute and deliver any water, steam, electrical, gas or other power or heat; to buy, erect, maintain, operate, sell, dispose of and convey power plants, transmission lines, power stations and sub-plants; to obtain, buy, lease, own and hold municipal light and power franchises and buy plants, machinery, lines and appliances necessary to maintain and operate the same, and to sell and deliver to municipalities and to public and private corporations and private citizens, electrical

current and other power for heat, power, lighting and other purposes.

"Fourth, to buy, obtain, own sell and mortgage real estate and personal property and to borrow money in the name of the corporation and give notes, bonds, mortgages or other securities for same."

The complaint alleges that because of the alien ownership of the majority of the capital stock of appellant corporation, appellees, as Governor and Attorney-General, respectively, have threatened to enforce, and unless restrained by order of court will enforce against appellant the aforesaid constitutional and statutory provisions, and will, by a suit at law in the Courts of Washington, wrongfully and illegally forfeit and escheat or attempt to forfeit and escheat to the state, the aforesaid easements upon which are located appellant's transmission lines and power station together with all improvements thereon; that in consequence, unless appellees be enjoined by decree of Court, appellant will be deprived of its property; that its business and the foreign commerce in which it is engaged will be irreparably injured, damaged and destroyed, and that appellant is without adequate remedy at law.

The complaint further alleges that said provision of the Constitution of Washington and said act of the legislature, and the enforcement thereof by appel-

lees against appellant and its said property, are and would be in contravention of and repugnant to the Commerce Clause of Sec. 8, Art. I; likewise, the Contract Clause, Sec. 10, Art. I; likewise the Due Process and Equal Protection Clauses, Sec. I of the 14th Amendment, to the Federal Constitution; likewise, the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827; also the Due Process Clause, Sec. 3, the Equality and Equal Protection Clause, Sec. 12, and the Contract Clause, Sec. 23, Article I, of the Constitution of Washington.

Pursuant to the prayer of the complaint, a temporary restaining order was issued (Rec. p. 52), and by the same order appellees were required to appear and show cause why an interlocutory injunction pendente lite should not issue.

On the subsequent hearing, before a three judge court, appellees filed a motion to dismiss the bill of complaint (Rec. p. 55), on the following grounds,

> "1. Said bill of complaint does not state any matters of equity entitling the plaintiff to the relief prayed for;
>
> 2. Said bill of complaint does not state facts sufficient to entitle plaintiff to any relief against these defendants or either of them;

3. The plaintiff has a plain, adequate and complete remedy at law."

The court filed an opinion (Rec. p. 6, 35 Fed. (2nd) 199, 202) denying the motion for an interlocutory injunction and granting the motion to dismiss.

A petition by appellant for a rehearing (Rec. p. 62) was denied (Rec. p. 63).

Thereafter, pursuant to said opinion, a judgment was entered (Rec. p. 63), omitting formal parts, as follows:

"This matter having heretofore come regularly on for hearing before Hon. Frank S. Dietrich, circuit judge, Hon. George M. Bourquin and Hon. Edward E. Cushman, district judges, upon motion of plaintiff for an interlocutory injunction and the motion of defendants to dismiss the bill of complaint, and the court having heard the argument of counsel and having heretofore entered its memorandum opinion herein and having denied the plaintiff's petition for rehearing, and being now fully advised in the premises, in accordance with said memorandum decision, and upon the grounds that the court has no jurisdiction of this action because it appears from the complaint herein that plaintiff has a plain, adequate and complete remedy at law in the premises, it is

Ordered, adjudged and decreed (1) that plaintiff's motion for an interlocutory injunction be and the same hereby is denied: (2) that defendant's motion to dismiss the bill of complain— be and the same hereby is granted; (3) that

this action be and the same hereby is dismissed; and (4) that defendants do have and recover of and from plaintiff their costs to be hereinafter taxed."

Appellant thereupon filed its assignment of errors (Rec. p. 64) and petition for an appeal from the above judgment and decree (Rec. p. 67), which was allowed by order of the District Court (Rec. p. 67).

SPECIFICATION OF ERRORS

Errors assigned below and intended to be urged on this appeal are specified as follows:

I

Assigned errors Nos. 1 and 2 (Rec. p. 64) are addressed to the denial by the lower court of appellant's motion for and its refusal to grant an interlocutory injunction as prayed in the bill of complaint.

II

Assigned errors Nos. 3 and 4 (Rec. p. 64) are addressed to the granting by the lower court of appellees' motion to dismiss and its dismissal of the suit.

III

Assigned error No. 5 (Rec. p. 64) is addressed to the awarding by the lower court of judgment to appellees for their costs.

IV

Assigned error No. 6 (Rec. p. 64) is addressed to the holding of the lower court that appellant had and has a plain, adequate and complete remedy at law.

V

Assigned errors Nos. 7 and 8 (Rec. p. 64, 65) are addressed to the holding of the lower court that it had no jurisdiction of and its refusal to exercise jurisdiction in and over the action or cause.

VI

Assigned error No. 9 (Rec. p. 65) is addressed to the refusal of the lower court to hold and declare Chapter 50 of the 1921 Session Acts of the State of Washington, ineffective, inoperative, inapplicable and void in so far as by its terms said statute may apply or be thought to apply to or restrict or limit the rights and interests of appellant alleged and described in the complaint, as and because in conflict with (a) the Due Process Clause, Sec. III; (b) the Equal Protection Clause, Sec. XII; and (c) the Contract Clause, Sec. XXIII of Art. I of the Constitution of the State of Washington.

VII

Assigned error No. 10 (Rec. p. 65) is addressed to the omission and refusal of the lower court to hold and decide that the threatened action and legal proceedings by appellees for the escheat and forfeiture of the properties, rights and interests of appellant, as alleged in the complaint, would be in violation of that provision of Sec. 33, Art. II of the Constitution of the State of Washington, excepting from the general provision of said section against alien ownership the necessary lands for mills and machinery to be used in the development and manufacture of products from alien owned lands containing valuable minerals, metals, iron, coal or fire clay.

VIII

Assigned error No. 11 (Rec. p. 65) is addressed to the omission and refusal of the lower court to declare Sec. 33 of Art. II of the Constitution of the State of Washington, ineffective, inoperative, inapplicable and void in so far as by its terms said section may apply, or be thought to apply, to (fol. 70) or restrict or limit the rights and interests of appellant alleged and described in the complaint, as and because in conflict with (a) the Commerce Clause, Sec. VIII, Art. I; (b) the Contract Clause, Sec. X,

Art. I; (c) the Due Process Clause of Sec. I of the 14th Amendment; and (d) the Equal Protection Clause of Sec. I, of the 14th Amendment to the Constitution of the United States.

IX

Assigned error No. 12 (Rec. p. 66) is addressed to the omission and refusal of the lower court to hold and declare Chapter 50 of the 1921 Session Acts of the State of Washington ineffective, inoperative, inapplicable and void in so far as by its terms said statute may apply, or be thought to apply, to or restrict or limit the rights and interests of appellant alleged and described in the complaint, as and because in conflict with, (a) the Commerce Clause, Sec. VIII, Art. I; (b) the Contract Clause, Sec. X, Art I; (c) the Due Process Clause of Sec. I of the 14th Amendment; and (d) the Equal Protection Clause of Sec. I of the 14th Amendment to the Constitution of the United States.

X

Assigned error No. 13 (Rec. p. 66) is addressed to the omission and refusal of the lower court to hold and declare Sec. 33 of Art. II of the Constitution of the State of Washington ineffective, inoperative, inapplicable and void in so far as by its term

said section may apply, or be thought to apply, to or restrict or limit the rights and interests of appellant alleged and described in the complaint, as and because in conflict with the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

XI

Assigned error No. 14 (Rec. p. 66) is addressed to the omission and refusal of the lower court to hold and declare Chapter 50 of the 1921 Session Acts of the State of Washington ineffective, inoperative, inapplicable and void in so far as by its terms said section may apply, or be thought to apply, to (fol. 71) or restrict or limit the rights and interests of appellant alleged and described in the complaint, as and because in conflict with the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

ARGUMENT

I

NO REMEDY AT LAW

(a) It is established that a remedy at law, to constitute an obstacle to equitable relief in the Federal Court, must be a remedy on the law side of that court.

Smyth vs. Ames, 169 U. S. 466, 478, 42 L. ed. 819, 838;

Chicago, B. & Q. R. Co. vs. Osborne, 265 U. S. 14, 16, 68 L. ed. 878, 880;

Risty vs. Chicago, R. I. & P. R. Co., 270 U. S. 378, 388, 70 L. ed. 642, 650;

Southern Ry Co. vs. Query, 21 Fed. (2d) 333;

Franklin vs. Nevada-Calif. Power Co., 264 Fed. 643, 645;

Fredenberg vs. Whitney, 240 Fed. 819, 829.

(b) It is likewise established that in order to be adequate, the remedy at law must be as complete, practical and efficient as that which equity could afford.

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341;

Ex Parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 761;

Terrace vs. Thompson, 263 U. S. 197, 214, 68 L. ed. 255, 274;

Risty vs. Chicago, R. I. & P. R. Co., 270 U. S. 378, 388, 70 L. ed. 642, 650;

Jefferson vs. Gypsy Oil Co., 27 Fed. (2d) 304, 308;

Rast vs. VanDeman & Lewis Co., 240 U. S. 342, 355, 60 L. ed. 679, 689.

(c) No legal remedy can be adequate except it be vested in the complainant, in the sense that he may at all times resort thereto at his own option, fully and freely, without let or hindrance.

Fredenberg vs. Whitney, 240 Fed. 819, 822;

Bank vs. Stone, 88 Fed. 383, 397.

(d). The order and decree of dismissal (Rec. p. 63) expressly states that an interlocutory injunction is denied and the suit dismissed

> "* * * upon the ground that the court has no jurisdiction of this action because it appears from the complaint herein that plaintiff has a plain, adequate and complete remedy at law in the premises."

The opinion below (35 Fed. (2d) 199, 202, Rec. p. 61) makes it clear that the District Court viewed, as constituting a remedy at law, the right which appellant would have to appear and defend in the state court against the forfeiture proceeding the institution of which this suit seeks to restrain. This view entirely disregards and is in direct conflict with the above

postulates. It contemplates submission, in the first instance, to destruction of property and irreparable damage—the antithesis of due process of law.

Obviously the right to prevent an impending wrong, certain to work irreparable injury, is a very different thing from the right to defend against that wrong after it shall have been set in motion, and the irreparable injury in part at least, has been accomplished. In the situation disclosed by the complaint, it is apparent that the right to appear and defend in the state court, against the identical proceeding sought by this suit to be prevented, would not, in the very nature of the situation, be adequate or in any sense complete.

As said in *Public Service Co. of Northern Illinois vs. Corboy*, 250 U. S. 153, 159, 63 L. ed. 905, 908,

> "Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined. The doctrine is elementary, but we refer to a few of the leading cases by which it is sustined."

With respect to the contention, under analagous facts, that no power existed in the Federal Court to

restrain action by state officers, under an allegedly unconstitutional state statute, until by final action of an appropriate state court it should be decided that the statute, and the things threatened to be done thereunder, were not in fact repugnant to the constitution, in *Home Teleph. & Teleg. Co. vs. Los Angeles*, 227 U. S. 278, 284, 57 L. ed. 510, 514, it is said:

> "Thus, being applicable equally to all Federal Courts, under all circumstances, in every stage of a proceeding, the enforcement of the doctrine would hence render impossible the performance of the duty with which the Federal courts are charged under the Constitution. Such paralysis would inevitably ensue, since the consequence would be that, at least in every case where there was a coincidence between a national safeguard or prohibition and a state one, the power of the Federal court to afford protection to a claim of right under the Constitution of the United States, as against the action of a state or its officers, would depend on the ultimate determination of the state courts, and would therefore require a stay of all action to await such determination. * * * It is manifest that, in necessary operation, the doctrine which was sustained would in substance, cause the state courts to become the primary source for applying and enforcing the constitution of the United States in all cases covered by the 14th Amendment. * * * The vice which not only underlies but permeates the proposition is not far to seek. It consists, first, in causing by an artificial construction the provisions of the 14th Amendment not to reach those to whom they are addressed when reasonably construed; and, second, in wholly misconceiving the scope and operation of the

14th Amendment, thereby removing from the control of the Amendment the great body of rights which it was intended it should safeguard, and in taking out of reach of its prohibitions the wrongs which it was the purpose of the Amendment to condemn."

To the same effect,

Ex Parte Young, 209 U. S. 123, 163, 52 L. ed. 714, 730;

Green vs. Louisville, etc. Ry. Co., 244 U. S. 499, 506, 61 L. ed. 1280, 1285;

Oklahoma Natural Gas Co. vs. Russell, 261 U. S. 290, 293, 67 L. ed. 659, 662;

Banton vs. Belt Line Ry. Corp., 268 U. S. 413, 417, 69 L. ed. 1020, 1024.

(e) Though it be conceded, for purposes of argument, that appellant had a remedy in the state court, under the conditions admitted for present purposes by the motion to dismiss, a constitutional right being insisted on, exhaustion of that remedy would not be a condition precedent to relief in the Federal Court.

Railroad & Warehouse Comm. vs. Duluth Street R. Co., 273 U. S. 625, 628, 71 L. ed. 807, 810;

Pacific Teleph. & Teleg. Co. vs. Kuykendall, 265 U. S. 196, 68 L. ed. 975;

Oklahoma Natural Gas Co. vs. Russell, 261 U. S. 290, 67 L. ed. 659.

(f) It is of importance, furthermore, that this application is under an act of Congress, U. S. C., Sec. 380, Judicial Code, Sec. 266, especially providing for the issuance of an injunction restraining state officers from enforcing unconstitutional statutes. The fact, therefore, that Congress has seen fit specially to authorize injunctive relief and to indicate the procedure, in situations of the character disclosed by the complaint, should of itself, it would seem, largely modify with respect to applications under the statute, earlier judicial pronouncements concerning generally the granting and the refusing of injunctions. To deny relief on an application under this statute on the general ground, without regard to the particular facts, that an adequate remedy is afforded by the identical state statute, the enforcement of which by action thereunder is sought to be enjoined as unconstitutional, would appear to negative, circumvent and render inoperative the act of Congress recognizing the right and prescribing the practice appropriate to obtaining the relief sought.

(g) The two cases,

Boise Artesian Water Co. vs. Boise City, 213 U. S. 276, 53 L. ed. 793; and

Cavanaugh vs. Looney, 248 U. S. 453, 456, 63 L. ed. 354, 357,

on which the opinion below appears principally to be based, are readily distinguishable. In the first case, *Boise Artesian Water Co. vs. Boise City,* supra, it was sought to restrain the collection of a monthly license fee, Holding that an injunction should not be granted, in the absence of a showing that enforcement of the ordinance imposing the license would work an irreparable injury, the opinion states,

> "The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchise.
>
> But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law."

In contradistinction to the language just quoted, pointing out the conditions, absent there but present here, that would have justified equitable relief, the opinion further states,

> "If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city, and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties."

Than the language just quoted, it is believed that no stronger argument could be made on appellant's behalf. It certainly does not support the opinion below.

In the second case, *Cavanaugh vs. Looney,* no question of foreign or interstate commerce, nor of the destruction or the working of irreparable injury to an established business was involved but an injunction was sought to prevent the taking by eminent domain proceedings in a state court of certain apparently vacant lands. The true basis of the opinion, in no wise antagonistic to appellant's contention, is found, we believe, in the following excerpt therefrom.

> "When considered in connection with established rules of law relating to the power of eminent domain, complainant's allegation of

> threatened 'irreparable loss and damage' appears fanciful. The detailed circumstances negative such view and rather tend to support the contrary one."

There is reference also, in the opinion below, to *Terrace vs. Thompson,* 263 U. S. 197, 215, 68 L. ed. 255, 274, and *Webb vs. O'Brien,* 263 U. S. 313, 321, 68 L. ed. 318, 321, and the opinion in the first case is quoted to show the dire necessity there prevailing, including not only property loss but criminal liability as well. More to the point, we respectfully submit, is the further statement in *Terrace vs. Thompson,*

> "But the legal remedy must be as complete, practical and efficient as that which equity could afford."

While it is true that this case does not, as did *Terrace vs. Thompson,* contemplate the peril of criminal proceedings, the criminal phase of the statute there involved was in no sense indispensible to or determinative of the view there expressed with reference to the granting of equitable relief. That case did not, on the other hand, involve any question of protection from confiscation and destruction of foreign commerce, which is the immediate object of the present proceeding, upon which application was made to the District Court under the Commerce Clause and other provisions of the Federal Constitution, heretofore enumerated.

II

JURISDICTION

(a) The complaint alleges threatened enforcement by state officers of provisions of a state constitution and statute attacked as repugnant to the Federal Constitution, which necessarily, if consummated, would work irreparable damage to appellant's property and burden and destroy foreign commerce. The allegations of fact stand admitted by the motion to dismiss. That the District Court had jurisdiction of the parties and the subject matter is not disputed. Hence, the complaint states cause for injunctive relief under Sec. 266 of the Judicial Code as amended, U. S. C. Title 28, Sec. 380.

Ohio Oil Co. vs. Conway, 279 U. S. 813, 73 L. ed. 972;

Rast vs. VanDeman & Lewis Co., 240 U. S. 342, 355, 60 L. ed. 679, 686;

Louisville & N. R. Co. vs. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 239;

Phoenix Ry. Co. vs. Garry, 239 U. S. 277, 281, 60 L. ed. 287, 289;

Ex parte Northern Pacific Ry. Co., 280 U. S. 142, 74 L. ed. 124;

Binderup vs. Pathe Exch., 263 U. S. 291, 309, 68 L. ed. 308, 316;

Terrace vs. Thompson, 263 U. S. 197, 216, 68 L. ed. 255, 263;

Truax vs. Raich, 239 U. S. 33, 37, 60 L. ed. 131, 133.

Federal jurisdiction is invoked by the complaint, to restrain state officers from the commission of acts, sought to be justified by provisions of the State Constitution, alleged by the complaint to be in conflict with the Federal Constitution. Except those allegations be found unsubstantial and not in good faith, that jurisdiction will not be lost, though it should be found that the acts sought to be restrained are in no sense authorized by the State Constitution.

Liberality should be the rule on applications for interlocutory injunctions where the questions are grave and the opposing party may be adequately indemnified against loss.

Ohio Oil Co. vs. Conway, 279 U. S. 813, 815, 73 L. ed. 972, 973.

As said in *Oklahoma Natural Gas Co. vs. Russell*, 261 U. S. 290, 292, 67 L. ed. 659, 662, Sec. 266 of the Judicial Code, Sec. 380, Title 28, U. S. C., as

amended, "plainly was intended to enlarge, not restrict the law."

(b) A wrongful act can never be justified by a wrong interpretation of a valid law and appellant would be entitled to protection, however Sec. 33, Art II of the State Constitution be construed, provided the acts alleged as grounds for Federal jurisdiction and sought to be enjoined are in fact violative of rights vouchsafed by the Federal Constitution.

As said in *Reagan vs. Farmer's Loan & T. Co.*, 154 U. S. 362, 390, 38 L. ed. 1014, 1021, and quoted with approval in *Greene vs. Louisville & I. R. Co.*, 244 U. S. 499, 507, 61 L. ed. 1280, 1285,

> "The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional. * * * Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

To same effect, citing authorities,

Fidelity & D. Co. vs. Tafoya, 270 U. S. 426, 434, 70 L. ed. 664, 667;

Herkness vs. Irion, 278 U. S. 92, 94, 73 L. ed. 198, 199.

(c) Beyond dispute, the objection in an equity suit, that there is an adequate remedy at law, goes not to the jurisdiction of the court, as a Federal Court, but to the character or quality only of the relief available.

Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 690, 71 L. ed. 1297, 1301;

Smith vs. McKay, 161 U. S. 355, 40 L. ed. 731;

Blythe vs. Hinckley, 173 U. S. 501, 43 L. ed. 783;

Pusey & Jones Co. vs. Hanssen, 261 U. S. 491, 67 L. ed. 763, 772;

Jefferson vs. Gypsy Oil Co., 27 Fed. (2d) 304, 307;

Illinois Central Ry. Co. vs. Adams, 180 U. S. 28, 41, 45 L. ed. 410, 412;

Savage vs. Jones, 225 U. S. 501, 540, 56 L. ed. 1182;

Scully vs. Bird, 209 U. S. 481, 490, 52 L. ed. 902;

Kelly vs. United States, 30 Fed. (2d) 193, 194.

It follows, though the existence of an adequate legal remedy be for the moment conceded, that the suit

instead of being dismissed should have been transferred to the law side of the Federal Court.

Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 690, 71 L. ed. 1297, 1301;

Rice & Adams Corp. vs. Lathrop, 278 U. S. 509, 514, 73 L. ed. 480, 482;

Kelly vs. United States, 30 Fed. (2d), 193, 194.

Thus in *Twist vs. Prairie Oil & Gas Co.*, supra, it is said,

> "Formerly if a plaintiff in a federal court sued in equity and the objection that there was a plain, adequate and complete remedy at law was sustained, the bill was necessarily dismissed. * * * Now, under the Act of March 3, 1915, chap. 90, 274a, 38 Stat. at L. 956, U. S. C. title 28, 397, and Equity Rules 22 and 23, if the suit was improperly brought in equity, either the trial court or the appellate court may transfer the case to the law side. * * * the objection that the bill does not make a case within the equity jurisdiction of a federal court goes not to the power of the court, but to the merits.

III

SCOPE OF INQUIRY

(a) The circumstance that the order and decree of dismissal recites that the court was without jurisdiction, in that appellant had a plain and adequate

remedy at law, upon which ground, among others, the complaint was attacked by the motion to dismiss, does not alter the fact that the court exercised general jurisdiction in the rendition and entry of its order and decree.

As said in *Twist vs. Prairie Oil & Gas Co.*, 274 U. S. 684, 691, 71 L. ed. 1297, 1302,

> "The objection that the bill does not make a case within the equity jurisdiction of the Federal Court goes not to the power of the court as a Federal Court but to the merits."

In the language of *Flanders vs. Coleman*, 250 U. S. 223, 228, 63 L. ed. 948, 950,

> "The opinion of the district court shows that it really considered the merits of the case in reaching the conclusion that it was without jurisdiction."

Also,

Binderup vs. Pathe Exch., 263, U. S. 291, 305, 68 L. ed. 308, 314.

(b) Since the lower court asserted and exercised jurisdiction over the merits, all questions there open for decision are subject to review on this appeal,

Hopkins vs. Southern Calif. Tel. Co., 275 U. S. 393, 399, 72 L. ed. 329, 336;

Greene vs. Louisville & I. R. Co., 244 U. S. 499, 508, 61 L. ed. 1280, 1286;

Shaffer vs. Carter, 252 U. S. 37, 49, 64 L. ed. 445, 455;

Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 691, 71 L. ed. 1297, 1302,

including non-Federal questions upon which, if possible, the decision will be made to rest without consideration of the Federal questions presented.

Siler vs. Louisville & N. R. Co., 213 U. S. 175, 195, 53 L. ed. 753, 757;

Ohio Tax Cases, 232 U. S. 576, 586, 58 L. ed. 738, 743;

Greene vs. Louisville & I. R. Co., 244 U. S. 499, 508, 61 L. ed. 1280, 1286;

United Fuel & Gas Co. vs. Railroad Commission, 278 U. S. 300, 307, 73 L. ed. 390, 395.

IV

GRANTS NOT WITHIN INHIBITION

(a) The inhibitive Section 33, Article II, of the Constitution of Washington, reads,

"The ownership of lands by aliens, other than those who in good faith have declared their in-

tention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

A supplemental statute, enacted in 1921, somewhat broader than the constitutional provision, Laws of Washington 1921, Chap. 50, a copy of which is attached as an appendix, must, it is believed, be put entirely out of consideration as inapplicable to the easements here involved, all of which were acquired in 1917. Such is the holding of the Supreme Court of Washington.

State vs. Natsuhara, 136 Wash. 436, 444, 240 Pac. 557;

State vs. Matomatsu, 139 Wash. 639, 247 Pac. 1032.

In the closing sentence of the opinion in the Natsuhara case it is said,

"We therefore, conclude that the Act of 1921 does not, and was not intended to, apply to valid leases entered into in good faith prior to its enactment."

Even were the question not set at rest by the quoted decision of the State Supreme Court, with respect to appellant's antecedent property and contract rights, including its municipal franchises, the 1921 Statute is repugnant not alone to the Due Process and Equal Protection Clauses of the 14th Amendment, but violates at the same time, with respect to appellant's antecedent rights, the Contract Clause, Sec, 10, Art. I of the Federal Constitution.

Columbus etc. Ry. Co. vs. Columbus, 249 U. S. 399, 63 L. ed. 669, 676;

Frost vs. Corporation Commission, 278 U. S. 515, 553, 73 L. ed. 483;

Hanover etc. Co. vs. Carr, 272 U. S. 494, 517, 71 L. ed. 372, 379;

City of Dayton vs. City Ry. Co., 16 Fed. (2d) 401.

(b) Bearing in mind that the constitutional inhibition, with which only, and not the statute, we are concerned, is restricted to

"the ownership of lands by aliens,"

we turn now to the right-of-way conveyances attached as exhibits to the complaint (Rec. pp. 7 to 43, inclusive), some of which, but not all, specifically provide for reversion when use for right-of-way purposes shall cease (the others on abandonment would revert by operation of law, 19 C. J., 940, Sec. 149), we find that the grant, identical in the several instruments, is not of "ownership" or title, but for the

> "full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain its (appellant's) Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances,"

from which we conclude that the rights here involved do not come within the ban of the constiution, as distinguished from the 1921 legislative act, with which, as shown, we are not here concerned.

The Supreme Court of Washington from an early period has consistently held that a lease of real estate, for however long a period, is personal property.

Tibbals vs. Iffland, 10 Wash. 451, 455, 39 Pac. 102;

American Sav. Bk. & Tr. Co. vs. Mafridge, 60 Wash, 180, 185, 110 Pac. 1015;

Taylor vs. Basye, 119 Wash. 263, 265, 205 Pac. 16;

Myers vs. Arthur, 135 Wash. 583, 585, 238 Pac. 899;

Salisbury vs. Alskog, 144 Wash. 88, 89, 256 Pac. 1030;

Barr vs. Campbell Mill Co., 154 Wash. 83, 85, 280 Pac. 929.

The last case cited, *Barr vs. Campbell Mill Co.*, is directly in point, holding that an easement in the form of a logging road, is not real estate but mere personal property.

> "The question then is, is an easement such as was here contemplated, real estate within the terms of the statute. We think the question has been answered in *Myers vs. Arthur*, 135 Wash. 583, 238 Pac. 899, where this court said:
>
> 'In this state, while the statute with reference to conveyances, 10550, Remp. Comp. Stat. (P. C. 1909), provides, 'All conveyances of real estate or any interest therein, . . . shall be by deed,' the statute applicable to the present case says only 'real estate' and does not include the words 'interest in real estate.' * * * If the purchase or sale of a leasehold regardless of its term of years is not a sale of real estate, then certainly the purchase or sale of an easement which, by its terms, is limited 'to continue so long as the right-of-way is used for hauling logs,' is not a sale of real estate, and is nothing but a chattel real and is personal property."

We are not unmindful of the holding of the State

Supreme Court that a lease to an alien, in order to be valid under the constitutional inhibition, must be for a reasonable period, a relative term depending on the circumstances in the given case.

State vs. Natsuhara, 136 Wash. 437, 240 Pac. 557;

State vs. Matomatsu, 139 Wash. 639, 247 Pac. 1032;

State Ex Rel Winston vs. Morrison, 18 Wash. 664, 52 Pac. 228.

We contend, however, that this doctrine is altogether inconsistent with the recent and fully reasoned conclusion by the same court in the cases last cited, particularly, *Barr vs. Campbell Co.*, holding that a logging road easement, to continue so long as used for that purpose, is not real estate but personal property.

(c) Examination of the authorities leads to the conclusion that the rights held by appellant are nothing more than easements in gross, mere personal rights or licenses as distinguished from easements appurtenant. As said in 9 R. C. L., 739,

"There is, however, a class of rights which are impressed upon the land of one person in favor

> of another person or other persons, and not in favor of another tract of land, and these rights are sometimes spoken of by courts and legal writers as 'easements in gross.' * * * The easement is in gross, and personal to the grantee, because it is not appurtenant to other premises."

Still more to the point, we quote from 19 C. J. 867,

> "* * * thus, among other easements, a right-of-way which has neither of its termini on the premises of the owner and is not appurtenant to any estate is called a right-of-way in gross; it is a mere personal right and is neither assignable nor inheritable, nor can it be made so by any terms in the grant."

On the other hand, as explained in *Branan vs. Wimsatt,* 298 Fed. 833, 836,

> "An easement appurtenant cannot exist without a dominant tenement, and an easement in gross cannot be acquired except by a grant in writing or by prescription, which presupposses a grant."

And, quoting again from 9 R. C. L. at page 737,

> "It (an easement appurtenant) is incapable of existence separate and apart from the particular land to which it is annexed."

An easement in gross, therefore, is everywhere declared to be personalty and subject in all respects to be delt with as such under the law.

"An easement in gross, as the term is now commonly used, is a mere personal right in the land of another, while an easement appurtenant is an incorporeal right which is attached to and belongs to some greater or superior right."

Stovall vs. Coggins Granite Co., 42 S. E. 723, 724.

"An easement in gross is a mere personal interest in the real estate of another, and is not assignable or inheritable. It dies with the person, and it is so exclusively personal that the owner by right cannot take another person in company with him."

Ernst vs. Allen, et al, 184 Pac. 827, 829.

That the rights here in question fall within the latter class, easements in gross, is established by authority.

The recent Illinois case of *Waller vs. Hildebrecht*, 128 N. E. 807, 809, well illustrates the distinction.

"Generally speaking, where a particular or special right or easement in land, is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed. * * * There is nothing in the deed to indicate that the parties intended the right-of-way over the south 10 feet of lot 6 to be appurtenant to lot 7. William Grus was not the owner of lot 7, and so far as appears from this record was not the owner

of any land. There is no dominant estate, and there being no dominant estate there can be no easement. The right-of-way, therefore, is in gross and personal to William Grus, because it is not appurtenant to any other premises. *Garrison vs. Rudd,* 19 Ill. 558; *Willoughby vs. Lawrence,* 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758. Being a right personal to Grus, it was incapable of assignment, and appellant took no interest in this portion of lot 6 by virtue of the conveyance to her of lot 7."

Also, from *Kershaw vs. Burns,* 74 S. E. 378, 379,

"A right of way may be in gross, or it may be appendent or appurtenant to land, and the distinction between the two kinds of rights are very marked and important. In the former, it is a mere personal privilege, which dies with the person who may have acquired it; while in the latter it inheres in the land to which it is appurtenant, is essentially necessary to its enjoyment, and passes with it. * * * A right of way which has neither of its termini on the premises of the grantee, and is not essentially necessary to the enjoyment of his premises, is not appurtenant to the grantee, and cannot be by him transferred, notwithstanding the grant is to him for value and to his heirs and assigns forever."

The principle is well stated in 33 Cyc., 169,

"A a general rule, however, if the deed purports to convey only a right of way, it does not convey the land itself but the fee remains in the grantor, and the railroad company acquires a mere easement in perpetuity in the land, for railroad purposes, although the conveyance is in the usual form of a full warranty deed."

In harmony also, are

Reichenbach vs. Washington Short Line R. Co., 10 Wash. 357, 38 Pac. 1126;

Knapp vs. Crawford, 16 Wash. 524, 48 Pac. 261;

Spokane vs. Colby, 16 Wash. 610, 48 Pac. 248;

Pacific Iron Works vs. Bryant Lumber Co., 60 Wash. 502, 111 Pac. 578;

Neitzel vs. Spokane International R. Co., 65 Wash. 100, 117 Pac. 864;

Boatman vs. Lasley, 23 Oh. St. 614;

Stockdale vs. Yerden, 190 N. W. 225.

We conclude, therefore, that the property which appellees, as officers thereof, propose to escheat to the State, being personal property, does not come within the purview of the provision of the State Constitution prohibiting alien ownership of land.

(d) Paragraph XI of the complaint (Rec. p. 5) alleges that appellant is the owner and engaged in the development of mining properties in Stevens County, Washington, in which development and for the manufacture of products therefrom it requires and utilizes a part of the electric energy in question, and protec-

tion of the exception from the inhibition of Sec. 33, Art. II of the State Constitution of mineral lands and

> "the necessary land for mills and machinery to be used in the development thereof and the manufacture of products therefrom,"

is claimed on that account.

While it does not appear that this clause of Sec. 33 has ever been construed by the Supreme Court of Washington and the question is, therefore, of first impression, it is appellant's contention that land burdened with transmission lines and substations necessary for the delivery of power used in the operation of mills and machinery necessary for the development of mineral lands is in fact "necessary land for mills and machinery." since the mills and machinery could not be operated and would be useless without power which, in the form of electricity, can only be obtained through the construction and maintenance of transmission lines and substations.

V

CONTRACT IMPAIRED, EQUAL PROTECTION AND DUE PROCESS OF LAW DENIED

(a) The closing sentence of Sec. 33, Art. II of the State Constitution, reading

> "Every corporation, the majority of the capital

> stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition,"

is believed to violate not only the contract clause, Art. I, Sec. 10 of the Federal Constitution, the Equal Protection and Due Process Clauses of the 14th Amendment and corresponding provisions of the state constitution, but to be, at the same time, in plain conflict with and violative of Sec. 12, of Art. I (the Bill of Rights) of the Constitution of Washington, reading

> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

In the face of the language last quoted, it is not believed that logically it can be contended that appellant corporation, organized and existing under and by virtue of the laws of the State of Washington, is not endowed with and entitled to exercise privileges and immunities equal in all respects to those legally exercisable by any other corporation so organized and existing, regardless of the purely incidental and transient circumstances of the ownership at a particular time of the majority of its capital stock. Obviously, however, it cannot exercise, equally or at all, privileges and immunities belonging to other corporations if Sec. 33 of Art. II is to be given force and effect.

Furthermore, no argument is required to demonstrate that under the closing sentence of Sec. 33, Art. II of the State Constitution, a non-consenting and helpless minority stockholder of a Washington corporation might be deprived of his property, irreperably injured and left entirely without redress through transfer to aliens by the owners of a majority of the capital stock.

The conception of a private corporation as an individual entity wholly separate and apart in a legal sense from, and in no wise affected by changes in the ownership of its capital stock is ancient and universal.

Providence Bank vs. Billings, 4 Peters 514, 562, 4 L. ed. 939,

1 Blackstone Comm. p. 468;

Dartmouth College vs. Woodward, 4 Wheat. 518, 657, 4 L. ed. 629;

Peterson vs. Chicago, R. I. & P. Ry. Co., 205 U. S. 364, 391, 51 L. ed. 841, 852;

State ex rel vs. Tacoma Ry. Co., 61 Wash. 507, 513, 112 Pac. 506;

Davis vs. Bigelow Bldg. Co., 150 Wash. 576, 577, 274 Pac. 106;

1 Thompson on Corporations (3d ed.) Sec. 9.

As said long ago in *Providence Bank vs. Billings*, supra,

> "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

Appellant contends, therefore, that the clause of Sec 33, Art. II of the State Constitution now in question, being in clear conflict both with fundamentals and with the earlier, more general and more dominant provision, Sec. 12, Art. I of the same constitution, as well as the Equal Protection and Due Process Clauses of the 14th Amendment to the Federal Constitution, hereafter discussed, is inoperative and must be disregarded.

This view finds strong support in the opinion of the State Supreme Court in *Hastings vs. Anacortes Packing Co.*, 29 Wash. 224, 229, 230, 231, 69 Pac. 776, holding that a corporation under the laws of Washington is a citizen of the state, though a majority of its stock be owned by aliens. It is there said:

> "We cannot agree that a corporation organized and existing under and by virtue of the laws of this state is an alien because a majority of its capital stock is owned by aliens. * * * The legislature of this state has by general law authorized the formation of corporations to engage in the business for which the respondent corporation was organized to engage in. The act, after providing generally the purposes for which corporations may be organized, further provides that 'any two or

more persons' may organize a corporation for one or more of such purposes. (Ballinger's Code, 4250, et. seq.) It nowhere requires that the incorporators shall be citizens of the State or of the United States, nor does it require that the holders of a majority of the capital stock of the corporation shall be citizens of the state, or of the United States, * * * The language of the constitution on this subject is particularly restrictive. After prohibiting alien ownership of lands, it provides that 'every corporation the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition,'—*not that it shall be considered an alien for all purposes, or for any other purpose than the ownership of lands.* For all other purposes (than owning of lands) a corporation organized under the laws of the state, a majority of the capital stock of which is held by aliens, *is a domestic corporation,—a citizen of the state,*—and has all the rights and privileges the law accords to corporations generally." (Italics ours.)

The language just quoted is in harmony with Sec, 3852 of Rem. Comp. Stat. of Washington noted in our opening statement and set out in full as Appendix II, which by its terms, though somewhat inconsistently with other parts of the same section, provides that any corporation incorporated under the laws of any foreign country for any purpose for which domestic corporations are authorized to be formed under the laws of the state shall have full power and is authorized to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of all real estate or personal

property necessary or convenient for the carrying into effect of the objects and purposes of its formation.

Turning now to the consideration of other rights under the Federal Constitution, it is to be borne in mind that, as heretofore noted, appellant is authorized by its charter (Rec. p. 48) to buy, sell, own and operate power plants, transmission lines and power stations, also, to buy, sell and mortgage real estate in connection with its business of selling and distributing electric current for lighting and power purposes.

That the charter of a private corporation is a contract within the meaning of the Contract Clause of the Constitution has not been seriously questioned since the Dartmouth College case.

> *Minot vs. The Philadelphia, Wilmington & Baltimore R. Co.*, 18 Wall. 206, 225, 21 L. ed. 888.

As said in *Chicago, Burlington & Quincy Ry. Co. vs. Iowa*, 134 U. S. 155, 161, 24 L. ed. 94.

> "The Burlington and Missouri River Railroad Company, * * * was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals * * * This is, in substance, its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the mean-

> ing of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract."

Certainly, it would seem, if such a contract may not be impaired by legislation, for even stronger reasons under the 14th Amendment, the state should not be allowed to disregard or impair its obligation without legislative sanction.

The sanctity of a corporate charter is to be especially regarded where, as in the present instance, vested rights have been acquired thereunder.

> *Pearsall vs. Great Northern Ry. Co.*, 161 U. S. 646, 663, 40 L. ed. 838, 844.

It follows that appellant corporation is entitled to the privilege equally with other domestic corporations of maintaining its power lines and substations necessary for the conduct of its business, regardless of the not-illegal alien ownership of the majority of its stock. And this even though the ownership of real estate should become necessary to the exercise of its legitimate functions.

(b) It is well established, furthermore, on general principles, that a corporation possesses inherently such powers as may be necessary to enable it to carry into

effect the purposes for which it was created and for the exercise of all powers expressly granted.

Thompson on Corporations (3rd ed.), Sec. 2184, 2185, 2186.

As stated in Sec. 2188 of the same work,

> "Where an express power is granted to a corporation to do a particular act, or to engage in a stated business, this carries with it, by implication, the right to do every act which may be found reasonably necessary to give effect to the power expressly granted. On this principle every corporation, at least, in the absence of restrictive language, possesses the powers found necessary not only to its existence and self-preservation, but, as already said, to give effect to the powers expressly granted, or to effectuate the purposes and objects of the incorporation."

(c) That a corporation is a person within the meaning of the Due Process and Equal Protection Clauses of the 14th Amendment to the Federal Constitution is too well established to require extensive citation of authority.

Kentucky Finance Corp. vs. Paramount Auto Exch. Corp., 262 U. S. 544, 550, 67 L. ed. 1112, 1115;

Liggett vs. Baldrige, 278 U. S. 105, 111, 73 L. ed. 204, 208;

Frost vs. Corporation Commission, 278 U. S. 515, 552, 73 L. ed. 483, 488.

Appellant corporation, a creature of the State, cannot, except in the exercise of its police power, be deprived by the State of any privilege or immunity granted by its charter or accorded to other corporations, nor can it be required as a condition precedent to the privilege of exercising its normal functions, to relinquish rights guaranteed to all corporations alike by both the State and Federal Constitutions.

As said in *Quaker City Cab Co. vs. Pennsylvania,* 277 U. S. 389, 400, 73 L. ed. 927, 929,

> "Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances."

The following from *W. W. Cargill Co. vs. Minnesota,* etc., 180 U. S. 452, 468, 45 L. ed. 619, 626, is quoted with approval in *Power Mfg. Co. vs. Saunders,* 274 U. S. 490, 497, 71 L. ed. 1165, 1169,

> "* * * the acceptance of a license in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States."

As phrased in *Frost vs. Railroad Commission,* 271 U. S. 583, 596, 70 L. ed. 1101, 1106.

> "* * * the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution."

Also,

> *Williams vs. Standard Oil Co.*, 278 U. S. 235, 241, 73 L. ed. 287, 309.

Furthermore, should it be contended that an exercise by the state of its police power is involved, it may be answered in the language of *Liggett vs. Baldrige*, supra, citing many authorities, that

> "A state cannot, 'under guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restriction upon them.'"

It follows that appellant, a creature of the State of Washington and a citizen thereof, under the ruling of its highest court,

> *Hastings vs. Anacortes Pack. Co.*, 29 Wash. 224, 231, 69 Pac. 776, 778,

canont legally be deprived of or denied the advantages of that citizenship because of the alien ownership at a given time of a majority of its capital stock. Constitutional rights cannot, we respectfully submit, be made to depend on the shifting circumstance of the ownership and transfer of ownership of the capital stock of

a private corporation, a thing wholly beyond the control of the corporation and minority stockholders since not prohibited or condemned by any law of the state.

(d) Transformation, dependent on ownership of its stock, of a domestic corporation, into an alien or foreign corporation in order that it may be deprived of its property is forbidden by the Due Process Clause of the 14th Amendment.

It has been repeatedly held that a private carrier cannot, consistently with the 14th Amendment, be converted into a public carrier by legislative fiat.

Washington ex rel vs. Kuykendall, 275 U. S. 207, 211, 72 L. ed. 241, 244;

Frost etc. Truck Co. vs. Railroad Comm., 271 U. S. 583, 592, 70 L. ed. 1101, 1104;

Michigan Public Utilities etc. vs. Duke, 266 U. S. 570, 577, 69 L. ed. 445, 449.

We therefore contend that it is no more competent for the state to declare that a domestic corporation, a citizen of the state (*Hastings vs. Anacortes Pack. Co.,* 29 Wash. 224, 230), shall become an alien incapable of owning land through the simple process of the change of ownership of a majority of its capital stock, though such stock ownership is not of itself illegal.

Quite apposite, though employed in a different connection, is the following from *Frost vs. Railroad Commission*, 271 U. S. 583, 591, 70 L. ed. 1101, 1103,

> "That court, while saying that the state was without power, by mere legislative fiat or even by constitutional enactment, to transmute a private carrier into a public carrier, declared that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business thereon; and that, therefore, the legislature might grant the right on such conditions as it saw fit to impose. * * * That, consistently with the due process clause of the 14th Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command is a rule not open to doubt and is not brought into question here. It was expressly so decided in *Michigan Pub. Utilities Commission vs. Duke*, 266 U. S. 570, 577, 578, 69 L. ed. 445, 449, 450, 36 A. L. R. 1105."

Even could it be held that in legal contemplation appellant is an alien, because of the alien ownership of a majority of its capital stock, its rights would not be thereby altered, since it is not open to question that aliens are entitled to due process and equal protection under the 14th Amendment.

Terrace vs. Thompson, 263 U. S. 197, 216, 68 L. ed. 255, 275;

Home Ins. Co. vs. Dick, 281 U. S. 397, 74 L. ed.

As said with respect to a foreign corporation which had complied with the conditions precedent to domestication,

> "The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution."

Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389, 400, 72 L. ed. 227, 229.

Pointedly to the same effect is the following from *Hanover Fire Ins. Co. vs. Carr*, 272 U. S. 494, 514, 515, 71 L. ed. 372, 382,

> "* * * while a state may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights. * * * By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment."

VI

VIOLATION OF COMMERCE CLAUSE OF FEDERAL CONSTITUTION

(a) That the business in which appellant is en-

gaged constitutes foreign commerce is definitely established.

Public Utilities Comm. vs. Attelboro Steam & E. Co., 273 U. S. 83, 86, 71 L. ed. 549, 552;

Hagerla vs. Mississippi River Power Co., 202 Fed. 771, 786.

It is immediately obvious that this commerce would be utterly destroyed, not merely burdened and damaged, by the proposed action of the state which this suit seeks to enjoin.

Since the Federal Government has equal power for the regulation of foreign and interstate commerce, the pronouncements with regard to interstate commerce, in the cases to which reference will be made, have of course, equal application to foreign commerce.

(b) The power of the Federal Government for the regulation of interstate and foreign commerce is dominant, and it has long been established that the states of the Union, while retaining certain regulatory authority with respect thereto,

Simpson vs. Shepard, 230 U. S. 352, 396, 57 L. ed. 1511, 1540, 48 L. R. A. (N. S.) 1151,

are powerless to impose a direct burden of any kind thereon.

This is true though, in a given instance or relation, Congress may not have taken affirmative action.

Robbins vs. Shelby Taxing Dist., 120 U. S. 489, 493; 30 L. ed. 694.

First thoroughly considered by Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat. 1, 6 L. ed. 23, these general principles are no longer open to discussion and do not justify more than the bare citation of a few of the more recent cases illustrating their application.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196, 204, 29 L. ed. 158, 162;

Simpson vs. Shepard, 230 U. S. 352, 399, 57 L. ed. 1511, 1540, 1541;

Pennsylvania vs. West Virginia, 262 U. S. 553, 596, 67 L. ed. 1117, 1132;

Rhode Island vs. Attleboro Steam & E. Co., 273 U. S. 83, 86, 71 L. ed. 549, 552;

Dahnke-Walker Mill Co. vs. Bondurant, 257 U. S. 282, 291, 66 L. ed. 239, 244;

Shafer vs. Farmers Grain Co., 268 U. S. 196, 200, 69 L. ed. 909, 915;

Foster-Fountain Pack. Co. vs. Haydel, 278 U. S. 1, 10, 73 L. ed. 145, 153.

This doctrine is also fortified by the fact that under Art. VI, of the Federal Constitution, that instrument and the laws enacted by Congress thereunder, together with foreign treaties, constitute the Supreme Law of the Land,

> "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This fundamental is expressly recognized by the declaration of Art. I, Sec. II, of the Constitution of Washington, that

> "The constitution of the United States is the supreme law of the land."

(c) That the properties, which it is the object of this suit to protect from confiscation, are indispensible to the foreign commerce in which appellant is engaged is not open to question. Nor is it longer open to question that the protection afforded by the Commerce Clause, Sec. 8, Art. I, of the Federal Constitution, extends to all instrumentalities of that commerce.

From the recent case of *Foster-Fountain Pack. Co. vs. Haydel*, 278 U. S. 1, 10, 73 L. ed. 147, 153, we quote,

"Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among states. And a state statute that operates directly to burden any of its essential elements is invalid."

The language of Mr. Chief Justice Hughes in *Simpson vs. Shepard* (Minn. rate case), 230 U. S. 352, 398, 57 L. ed. 1511, 1540, is comprehensive.

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, *and to every instrumentality or agency by which it is carried on;* * * * This conclusion necessarily results from the supremacy of the national power within its appointed sphere. * * * The grant in the Constitution of its own force, that is, *without action by Congress,* established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority." (Italics ours.)

With equal emphasis Mr. Justice Field in *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S. 196, 204, 29 L. ed. 158, declared,

"And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of

regulation. Congress, alone, therefore, can deal with such transportation; *its non-action is a declaration that it shall remain free from burdens imposed by State legislation.*" (Italics ours.)

The following from the recent case of *Dahnke-Walker Mill Co. vs. Bondurant,* 257 U. S. 282, 290, 66 L. ed. 239, 243, is most comprehensive,

> "Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states *and all the component parts of that intercourse.* * * * A corporation of one state may go into another, without obtaining leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher vs. Kentucky,* 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; *Western U. Teleg. Co. vs. Kansas,* 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; *International Textbook Co. vs. Pigg,* 217 U. S. 91, 112, 54 L. ed. 678, 687, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Sioux Remedy Co. vs. Cope,* 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57." (Italics ours.)

To the same effect is the following from *Anderson vs. Shipowners Assn.* 272 U. S. 359, 363, 71 L. ed. 298, 301,

> "But ships and those who operate them are instrumentalities of commerce and within the commerce clause no less than cargoes."

Again, in *Hammer vs. Dagenhart,* 247 U. S. 251, 269, 62 L. ed. 1101, 1105, quoting with approval the language of Chief Justice Marshall in *Gibbons vs. Ogden,* supra, it is said,

> "In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities."

Also,

South Carolina vs. Georgia, 93 U. S. 4, 23 L. ed. 782;

Mondou vs. N. Y. etc. R. Co., 223 U. S. 1, 47-49, 56 L. ed. 327, 345, 346;

Smith vs. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510;

DiSanto vs. Pennsylvania etc., 273 U. S. 34, 37, 71 L. ed. 524, 526 (foreign commerce);

Pennsylvania Gas Co. vs. Public Ser. Comm., 252 U. S. 23, 27, 64 L. ed. 434, 441;

Pennsylvania vs. West Virginia, 262 U. S. 553, 596, 67 L. ed. 1117, 1132;

Interstate Commerce Comm. vs. Illinois C. R. Co., 215 U. S. 452, 474, 54 L. ed. 280, 289;

Ozark Pipe Corp. vs. Monier, 266 U. S. 555, 565, 69 L. ed. 439, 443.

(d) Because foreign commerce was thereby burdened, in *Philadelphia etc. Steamship Co. vs. Pennsylvania,* 122 U. S. 326, 30 L. ed. 1200, a Pennsylvania statute, which imposed upon a steamship company, incorporated under the laws of that state, a gross tax upon receipts derived from the transportation of persons and property by sea between different states and to and from foreign countries, was held void.

> "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government."

So in *Sault Ste. Marie vs. International Transit Co.* 234 U. S. 333, 338, 58 L. ed. 1337, 1339, a municipal ordinance requiring a license for the operation of a ferry across the St. Mary's River between the State of Michigan and the Province of Ontario, was held to violate the Commerce Clause of the Constitution and void.

Quite analagous are the recent holding that states may not regulate their public highways—instruments

of interstate commerce—in a manner to impose a burden on public carriers engaged in interstate commerce. Thus in *Michigan Public Utilities Commission vs. Duke,* 266 U. S. 570, 69 L. ed. 445, a statute requiring, as a condition to the privilege of using the highways of the state, that persons and corporations engaged in interstate commerce should likewise carry intra-state passengers and merchandise, was held void both as a burden on interstate commerce and as in contravention of the Due Process and Equal Protection Clauses of the 14th Amendment. With respect to the Commerce Clause it is there said,

> "The act would put on plaintiff the duty to use his trucks and other equipment as a common carrier in Michigan, and would prevent him from using them exclusively to perform his contracts. This is to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged as a private carrier, and so directly to burden and interfere with it. * * * The police power does not extend so far. It must be held that, if applied to plaintiff and his business, the act would violate the commerce clause of the Constitution."

Obviously, therefore, and beyond question it would seem, the easements together with the power lines and substations located thereon, likewise the municipal franchise from the town of Northport which would be rendered valueless if appellees be permitted to

carry out their admitted purpose, are indispensible instruments of foreign commerce and entitled as such to protection from confiscation by the state.

(e) Regardless of the innocent or beneficent purpose for which it may purport to have been adopted or enacted a state constitution or statute must, of course, give way to the authority of the Federal Government if by its operation it necessarily, in a given instance, obstructs interstate or foreign commerce.

In the language of *DiSanto vs. Pennsylvania,* 273 U. S. 34, 37, 71 L. ed. 524, 526,

> "A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. * * * The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders."

To the same effect, from *Foster-Fountain Pack. Co. vs. Haydel,* 278 U. S. 1, 10, 73 L. ed. 147, 153,

> "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce."

Also,

Public Utilities Commission vs. Attleboro Steam & E. Co., 273 U. S. 83, 89, 71 L. ed. 549, 553.

(f) It should probably be noted in passing that the police power of the state cannot be asserted as a justification for the confiscation or undue burdening of foreign or interstate commerce. Thus in *Lenke vs. Farmers Grain Co.*, 258 U. S. 50, 59, 66 L. ed. 458, 464, it is said,

> "This principle (the police power) has no application where the state passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it. This court stated the principle and its limitations in the discussion of the subject in the Minnesota Rate Cases (Simpson vs. Shepard) 230 U. S. 352, 57 L. ed. 1511."

To the same effect,

Myer vs. Nebraska, 262 U. S. 390, 400, 67 L. ed. 1042, 1045.

(g) Should it be contended, which is anticipated, that the general doctrine, affirmed in *Terrace vs. Thompson*, 263 U. S. 197, 217, 68 L. ed. 255, 275, and *Webb vs. O'Brien*, 263 U. S. 313, 322, 68 L. ed. 318, 321, that the state, in the absence of a treaty to the contrary, may deny to aliens the right to own land

within its borders, precludes assertion in the instant situation of the power of the Federal Government, it would be a sufficient answer that this doctrine must be applied with due regard for the constitutional rights of the individual, citizen and alien alike, and has no application at all as against the power and authority of the Federal Government for the protection of foreign commerce.

While the statement in *Terrace vs. Thompson* and *Webb vs. O'Brien*, supra, recognizes that the rule is inapplicable in the face of a treaty to the contrary, we respectfully submit that it is equally inapplicable in the face of a power expressly granted to the Federal Government. Article VI of the Federal Constitution declares that instrument, together with treaties and the laws of the United States made and enacted thereunder, to be alike the Supreme Law of the Land,

> "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Obviously, therefore, it cannot, with an semblance of reason, be contended that a treaty is more potent and far reaching in its effect than the constitution itself by virtue of which treaties are negotiated.

Since the power of the Federal Government for the regulation of interstate and foreign commerce is un-

qualified, full and complete, and extends to all instrumentalities of such commerce, the elementary rule that by implication it has power to do all things reasonably necessary for the exercise of the power expressly granted is called to action.

Marshall vs. Gordon, 243 U. S. 531, 537, 61 L. ed. 881, 885;

Cherokee Nation vs. Kansas Ry. Co., 135 U. S. 641, 656, 34 L. ed. 295;

South Carolina vs. United States, 199 U. S. 437, 451, 50 L. ed. 261, 265;

Lewis Pub. Co. vs. Morgan, 229 U. S. 288, 314, 57 L. ed. 1190, 1203;

Dillon vs. Gloss, 256 U. S. 368, 373, 65 L. ed. 994, 996.

In the first case supra, *Marshall vs. Gordon,* it is said,

> "The rule of constitutional interpretation announced in *McCulloch vs. Maryland,* 4 Wheat, 316, 4 L. ed. 579, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it."

In the second case, *Cherokee Nation vs. Kansas Ry. Co.,* concerning the right of a railroad company to

condemn land for a right-of-way, pursuant to an act of Congress, closely related in principle to the question here at issue, it is said,

> "Such an authority, as was said in *Kohl vs. United States,* 91 U. S. 367, is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. *United States vs. Fox,* 94 U. S. 315, 320; *United States vs. Jones;* 109 U. S. 513; *United States vs. Great Falls Manufacturing Co.,* 112 U. S. 645; *Van Brocklin vs. State of Tennessee,* 117 U. S. 151, 154. As was said by Mr. Justice Bradley in *Stockton vs. Baltimore etc. Railroad,* 35 Fed. Rep. 9, 19: 'The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within her limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes."

Clearly, the general authority of the State cannot be allowed to prevail against the necessities of foreign commerce.

VII
TREATY RIGHTS

Should the court, rejecting the arguments urged against Sec. 33, Article II of the State Constitution, conclude that appellant, with relation to the matters at issue, is to be considered an alien, by reason of the alien ownership of the majority of its capital stock, and incapable of owning land or retaining the easements here in question, then it is respectfully suggested that it is entitled, for itself and the commerce in which it is engaged, to protection under the 1815 Treaty between the United States and Great Britain, 1 Malloy's Compilation, 624, as extended by the Treaty of 1827, 1 Malloy's Compilation, 645.

The preamble of that treaty provides,

> "The United States of America and His Britannick Majesty being desirous, by a convention, to regulate the commerce and navigation between their respective countries, territories and people, in such a manner as to render the same reciprocally beneficial and satisfactory, have respectively named Plenipotentiaries, and given them full powers to treat of and conclude such convention, that is to say:"

The second sentence of Article I further provides,

> "The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories afore-

> said, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

It should probably be noted, in this connection, that by the concluding paragraph of Art. II of the Treaty, it is provided that Canada and the West Indies

> "shall not be affected by any provision of this article."

Clearly, therefore, by all accepted rules of interpretation, with respect to every part thereof, other than Art. II, not here material, the Dominion of Canada is affected by and comes in the fullest sense within the scope and under the influence of the treaty. Being entitled, therefore, not only "to hire and occupy houses and warehouses for the purposes of their (its) commerce" but to enjoy generally "the most complete protection and security for their (its) commerce," it is confidently submitted that, within the spirit and purpose of the treaty, appellant is entitled to enjoy protection and security in its occupancy and use of the necessary instruments of foreign commerce, here threatened by the state with confiscation.

The Supreme Court of Washington, *In re Stixrud's Estate,* 58 Wash. 339, 343, 109 Pac. 343, 345, definitely recognized the supremacy of an international treaty in the matter of property ownership in the State of Washington. It is there said,

> "It is equally well settled that the matter of removing the disability of aliens, in order that they may have the same rights as citizens to acquire and hold property in the states of the Union, is a proper subject of treaty regulation."

That the treaty should be liberally construed, so as to effect the obvious purpose between friendly nations for which it was negotiated, is firmly established.

Ohio ex rel Clarke vs. Deckenbach, 274 U. S. 392, 71 L. ed. 1115;

Jordan vs. Tashiro, 278 U. S. 123, 130, 73 L. ed. 214, 220.

Respectfully submitted,

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APPENDIX I

CHAPTER 50
(H. B. 79)

ALIENS

AN ACT relating to the rights and disabilities of aliens with respect to lands; providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

Section 1. In this act, unless the context otherwise requires,

(a) "Alien" does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

(b) "Land" does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every

other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen;

(c) "Land" also includes any share or interest in a corporation or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired;

(d) To "own" means to have the legal or equitable title to or the right to any benefit of;

(e) "Title" includes every kind of legal or equitable title;

(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

(g) "Inheritance includes devise;

(h) "Mortgage" includes every kind of lien upon land;

(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

(j) "Person" includes an individual, partnership, corporation or any other organized group of persons.

Sec. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

Sec. 3. An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land: *Provided,* An alien now lawfully acting in any such capacity may continue for not more than two years.

Sec. 4. If hereafter an alien acquire land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than twelve years from the date title was so ac-

quired or control or possession taken, the land shall be forfeited to the state.

Sec. 5. If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

Sec. 6. Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

Sec. 7. Whoever

(a) Knowingly transfers or conveys land or title to land to an alien; or

(b) Knowingly takes land or title to land in trust for an alien; or

(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for

thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney general or the prosecuting attorney of the county where the land is situated; or

(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or

(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the

nature and extent of the alien's interest in and title to the land; or

(g) Wilfully counsels, aids or abets another in violating or evading this act,

Is guilty of a gross misdemeanor.

Sec. 8. It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

Sec. 9. Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

Sec. 10. This act shall not impair any title or right heretofore or hereafter acquired from or derived through and alien in good faith and for value by a person not under an alien's disability.

Sec. 11. If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not effect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional.

Sec. 12. Sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated

Codes and Statutes of Washington are hereby repealed.

Passed the House February 25, 1921.

Passed the Senate March 2, 1921.

Approved by the Governor March 8, 1921.

APPENDIX II

SECTION 3852, REMINGTON'S COMPILED STATUTES OF WASHINGTON

Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise do (due) to or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this

act, and generally do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two succeeding sections of this chapter: Provided, however, that this chapter shall not be (so) construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state: And provided further, that no corporation, the majority of the capital stock of which is owned by aliens other than those who in good faith have declared their intention to become citizens of the United States, shall acquire the ownership of any lands in this state other than lands containing valuable deposits of minerals, metals, iron, coal, or fireclay, and the necessary land for mills and machinery to be used in the development thereof, and the manufacture of the products therefrom, except where acquired under mortgage, or in good faith in the ordinary course of justice in the collection of debts: Provided, further, that no foreign corporation which is hereafter organized which has among its other powers the busi-

ness of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized.

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IN THE

Supreme Court

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United States

OCTOBER TERM, 1930

NORTHPORT POWER AND LIGHT COMPANY, a corporation,
Appellant,

vs.

ROLAND H. HARTLEY, as Governor of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington.
Appellees.

No. 66

Appeal from the District Court of the United States for the Western District of Washington

REPLY BRIEF OF APPELLANT

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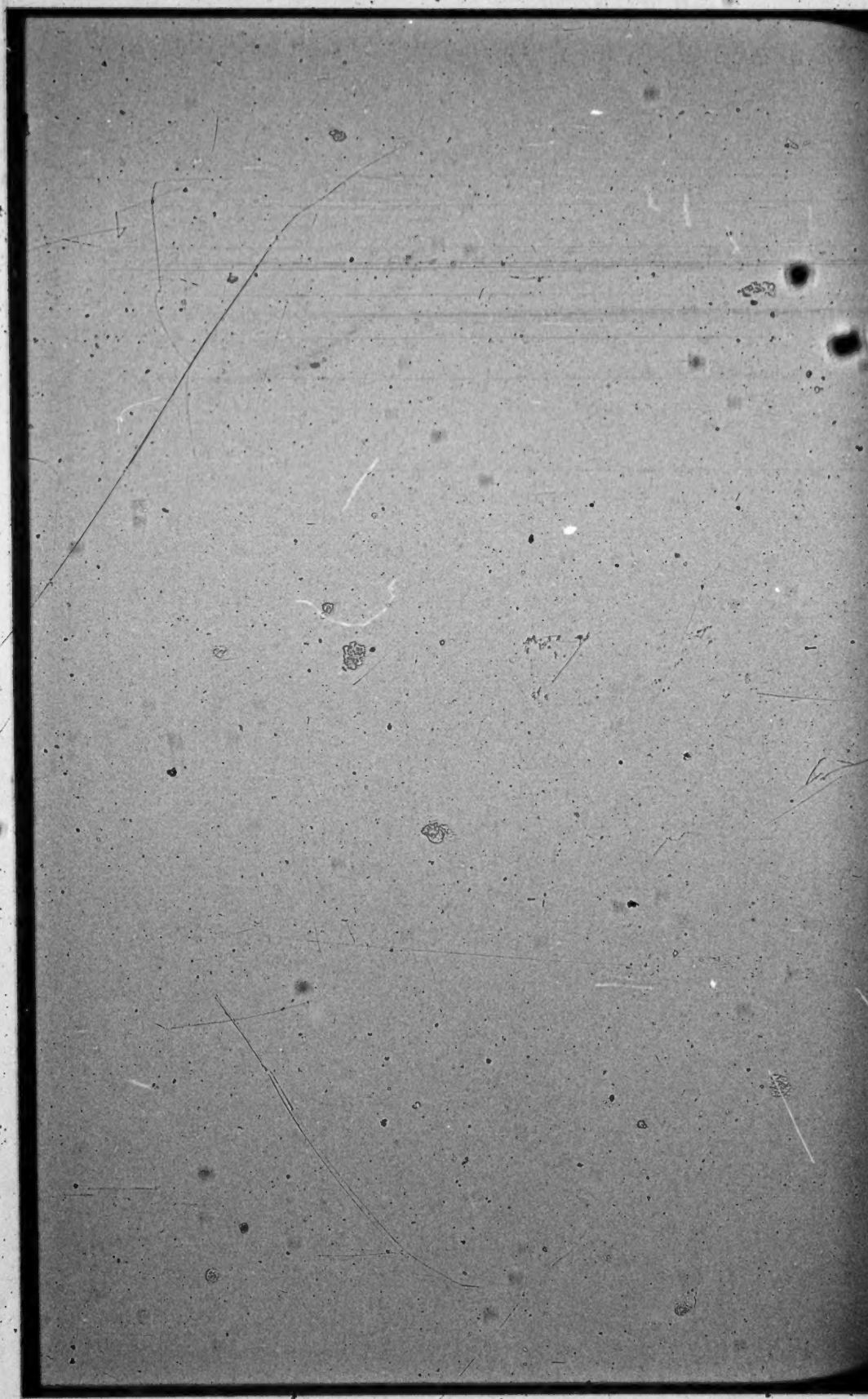

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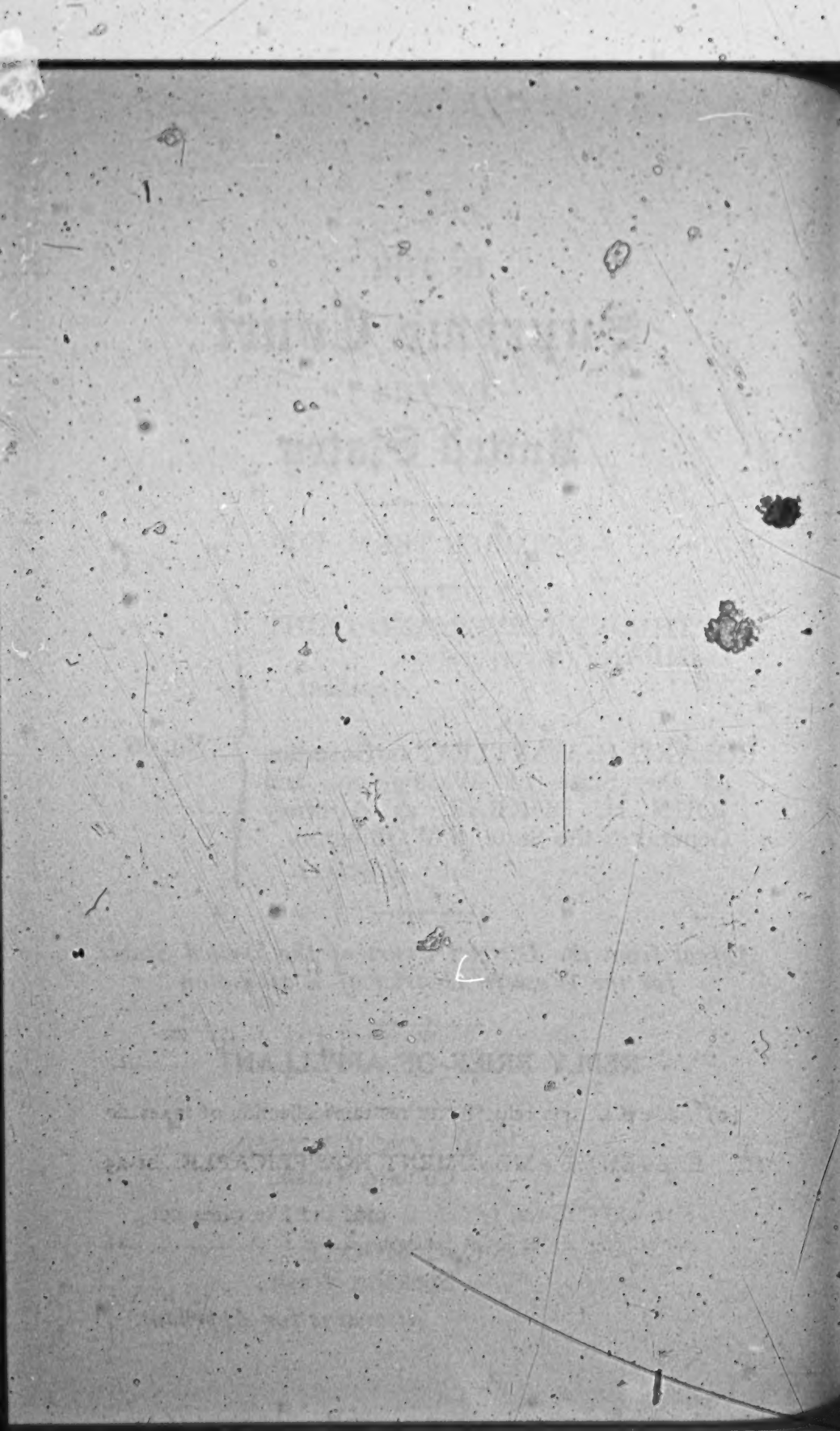

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I

NO WAIVER OF JURISDICTION

Seizing on an ill-chosen expression in appellant's brief to the effect that under two decisions of the state Supreme Court the 1921 Anti-Alien ownership statute is inapplicable to appellant's easements, considered as personalty, and that discussion would for that reason be confined principally to Sec. 33, Art. II of the State Constitution, it is contended (Appellees' brief, pp. 10, 11, 27, 32, 46) that a ground of federal jurisdiction is thereby waived and that this court has been deprived of jurisdiction or power to entertain this appeal.

The fallacy of this contention is not far to seek.

(a) Obviously the thought intended is that in so far as the 1921 Statute is *not* concordant with but broader in terms than Sec. 33, Art. II of the Constitution the decisions of the state court establish, without further discussion, that its enforcement against appellant's easements, considered in the category with leases, would be repugnant to the Contract Clause and the Equal Protection and Due Process Clauses of the 14th Amendment to the Federal Constitution, since leases under the state decisions are deemed to be

personal property, and that in so far as concordant with Sec. 33, Art. II of the Constitution, what might be thereafter said concerning the one would be equally applicable to the other.

The omission fully and clearly so to express the writer's meaning was a pure inadvertence, attributable perhaps to an undue regard for brevity. Waiver is a matter of intention, a voluntary relinquishment of a known right. Without intention no waiver can occur.

40 Cyc. 252, and numerous citations.

Clearly, no claim of waiver can be successfully predicated on an unhappy choice of inapt language intended as urging rather than waiving a consistently asserted constitutional right.

(b) It is elementary that jurisdiction, other than of the person, is not subject to waiver and may not be conferred by consent.

Gainsville vs. Brown-Crummer Inv. Co., 277 U. S. 54, 59, 72 L. ed. 781, 783.

Its existence or non-existence must be determined from the pleadings and the record, which the court will examine on its own motion without suggestion from counsel.

Minnesota vs. Hitcock, 185 U. S. 373, 46 L. ed. 954, 955.

(c) The complaint alleges that unless enjoined therefrom appellees will confiscate appellant's property under and by virtue of the 1921 Statute, and this allegation stands admitted for present purposes by the motion to dismiss.

That the allegations of the complaint bring the case within the purview of Sec. 380, U.S.C. is established by the authorities collated on pages 21 and 22 of appellant's opening brief and by many others that might be cited, some of which will be hereafter discussed under another and more appropriate head.

The jurisdictional grounds of this appeal, on the other hand, are set forth, with supporting authorities, in the printed statement filed by appellant pursuant to Rule 12, to which no answer or objection has been made by appellees or their counsel.

The District Court's summary of the pleadings and the arguments, 35 Fed. (2) 199, shows that the unconstitutionality of the 1921 Statute, as applied to appellant's rights, was urged below.

The refusal of the District Court to declare the 1921 Statute invalid is the basis of Assignments of Error 12 and 13 (Rec. p. 66) and these assignments are carried into appellant's brief, pp. 10 and 11, as Specifications of Error, 9 and 11. Also, in the first sentence

of appellant's statement of the issues, on the first page of the opening brief, it is stated that the suit is to enjoin the enforcement of the 1921 Statute as well as Sec. 33, Art. II of the Constitution. At page 3 the statute is again referred to and it is set out in full as Appendix I to the opening brief, while on page 29 authorities are collated in support of the contention that, in so far as by its terms it is broader than the constitutional provision, the statute, is repugnant to the Due Process and Equal Protection Clauses of the 14th Amendment and the Contract Clause of Art. I of the Federal Constitution, i. e. for reasons additional to those that may properly be urged against the constitutional provision, though the contract clause, cannot, of course, be urged against the pre-existing Sec. 33, Art. II of the State Constitution.

The entire record, including the opening brief taken as a whole, negatives any thought of remission of appellant's attack on the 1921 Statute. As said in *Dahnke-Walker Mill Co. vs. Bondurant,* 257 U. S. 282, 290, 66 L. ed. 239, 243,

> "It is loosely said in one of the briefs for the plaintiff that the 'sole question for decision' is whether the contract was a part of interstate commerce; but we attach no importance to this, because it not only is said in the same brief that the plaintiff 'maintained in the state court, and it maintains here, that the Kentucky statute, as con-

strued and applied in this case by the state court is unconstitutional under the commerce clause,' but much of that brief and of another is devoted to an effort to show the invalidity of the statute in that regard."

(d) The reference in appellant's brief to the two cases,

State vs. Natsuhara, 136 Wash. 436, 444, 240 Pac. 557;

State vs. Matomatsu, 139 Wash. 639, 247 Pac. 1032,

was merely arguendo. Immediately following, authorities in support of the claimed unconstitutionality of the statute are cited and the context of the entire argument thereafter shows the thought of the writer to have been that under the state decisions the 1921 Statute is inapplicable, in so far only as it is broader in scope than Sec. 33, Art. II of the State Constitution. The Washington Supreme Court has consistently sustained the validity of the statute,

State vs. O'Connell, 121 Wash. 542, 209 Pac. 865;

In re Fujimoto, 130 Wash. 188, 226 Pac. 505;

State vs. Natsuhara, 136 Wash. 436, 444, 240 Pac. 557;

State vs. Matomatsu, 139 Wash. 369, 247 Pac. 1032,

and the holding in the Natsuhara and Matomatsu cases, to the effect only that the statute is inapplicable to pre-existing leases on the ground that leases are not condemned by Sec. 33, Art. II of the State Constitution, is tantamount to holding it unconstitutional in so far as by its terms it purports to forfeit pre-existing leases.

The following from the Natsuhara opinion illustrates our point.

> "It will be observed that, by the constitution, the right of aliens to own real estate in certain respects is secured, and in other respects prohibited. No mention is made of leasehold interests. The constitution, therefore, does not prohibit the leasing of land to aliens for a reasonable length of time. *Terrace vs. Thompson*, 274 Fed. 841; *Terrace vs. Thompson*, 263 U. S. 197. * * * The lease here involved being valid when made (prior to 1921), the question arises whether the act of 1921 intended to operate against such interests. * * * There is another reason why the construction contended for by the state should not be given, if the act is reasonably susceptible of being construed as not to apply to prior valid leases. If it should be given a construction as applying to such leases, its constitutionality in this regard would be a grave question. * * * We, therefore, conclude that the act of 1921 does not, and was not intended to, apply to valid leases entered into in good faith prior to its enactment."

That a statute, in the relation here involved, may be unconstitutional in part only, was held in

Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282, 289; 66 L. ed. 239, 243, and

as further said in the same case,

> "A statute may be invalid as applied to one state of facts, and yet valid as applied to another. *Poindexter vs. Greenhow*, 114 U. S. 270, 295, 29 L. ed. 185, 194, 5 Sup. Ct. Rep. 903, 962; *St. Louis, I. M. & S. R. Co. vs. Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493; *Kansas City Southern R. Co. vs. Anderson*, 233 U. S. 326, 58 L. ed. 983, 34 Sup. Ct. Rep. 599."

It is contended, however (Par. 7 of Points and Authorities, Appellee's Brief, pp. 14, 15), that appellant's easements,

> "constitute an interest in and ownership of real estate prohibited under the Constitution of Washington to a corporation with a majority of its stock owned by an alien."

Consistently with this contention, i. e. that the easements "Constitute an interest in and ownership of real estate," appellee cannot claim the advantage, if advantage there be, of anything said in the Natsuhara and Matomatsu cases with respect to leases there held not within the ban of the constitutional provision and not for that reason, if subsequently acquired, within the application of the 1921 Statute.

(e) Admittedly, appellees have threatened to enforce and, unless enjoined, will enforce the 1921 Statute against appellant and its property. The circumstance, therefore, that the State Supreme Court, in another and unrelated case, has held the statute inapplicable to certain antecedent property rights, leasehold estates, can be of no avail to appellees, since they admit their purpose to enforce it in the present instance and to escheat appellant's property thereunder. The statute has been held constitutional by the State Supreme Court in every relation in which it has been called on to consider it, and the question of its applicability in this or any case is and must be a mixed question of law and fact depending for solution on the controlling fact or facts in each particular case.

Should appellees' contention that the grants in question are easements appurtenant, a species of real estate, be sustained, it would follow, by their own argument, since alien ownership thereof, viewed as real estate, was forbidden by Sec. 33, Art. II of the State Constitution at the time of their acquisition in 1917, that they also come under the ban and strict letter of the 1921 Statute.

(f) That Sec. 33, Art. II of the Constitution and the 1921 Statute must be considered in *pari materia* is clear, not alone from the circumstance that they refer

to the same subject but from the further fact that the statute specifically refers to and provides for the enforcement of the Constitutional provision. Sec. 2 of the 1921 Statute, reads,

> "An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. *Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state.* Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state." (Italics ours).

Being in *pari materia,* it follows that whatever may be said in the instant case in discussion of Sec. 33, Art. II of the State Constitution has like application to the 1921 Statute, in so far as the two are concordant. That such is the thought and purpose intended to be conveyed throughout appellant's opening brief is believed to be apparent, regardless of any lack of nicety or exactness of expression.

(g) The foregoing is on the assumption, for purposes of argument, that the term "statute" as employed in Sec. 380, U. S. C., is to be strictly defined and does not comprehend the provisions of a State Constitution. Such construction is not, however, accepted in fact. It is believed, on the other hand, that in the relation in which it is used in Sec. 380, U. S. C., Sec. 266 of

the Judicial Code, the word "statute" must be held to include every form of state law or enactment, of which a constitutional provision is the highest expression.

That Art. VI, Clause 2 of the Federal Constitution condemns alike

"the Constitution or Laws of any State"

when in conflict with the Constitution and laws of the United States, and treaties made thereunder, is believed to be of the utmost significance. It is also of significance that the word "statute" is not found in the constitutional indictment, from which we conclude that it is not to be confined to legislative enactments, or to "statutes" in the narrow sense of the term. Being directed in the alternative to the "Constitution or Laws" of any state, it is believed reasonable further to conclude that in its use in Sec. 380, U.S.C., Congress contemplated the word "statute" in its generic sense and as comprehending every form of written state law, of which, as heretofore suggested, a state Constitution is the highest example.

Among other definitions, the Standard Dictionary gives the following:

> "* * * the written or statute law, *lex scripta*, in contradistinction to the unwritten or common law; positive law. Any authoritatively declared rule, ordinance, decree or law."

More comprehensively, *Bouvier's Law Dictionary* (3d ed), Vol. 3, p. 3129, states,

> "This word (statute) is used to designate the written law in contradistinction to the unwritten law. Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits, or prohibits anything is designated a statute, without considering from what source it arises."

In *Williams vs. Bruffy*, 96 U. S. 176, 183, 24 L. ed. 716, with reference to the second section of the Amendatory Judiciary Act of 1867, it is said,

> "Any enactment, from whatever source originating, to which a state gives the force of law is a *statute* of the State, within the meaning of the clause cited relating to the jurisdiction of this court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature. There may be many acts authorized by the constitution of a State, or by the convention that framed it, which have not been submitted to the consideration of its legislature, yet have all the efficacy of laws."

The above language is quoted with approval in *New Orleans Water Works vs. Louisiana Sugar Co.*, 125 U. S. 18, 31, 31 L. ed. 607.

The following is quoted from *Stevens vs. Griffith*, 111 U. S. 48, 50, 28 L. ed. 348,

> "Any enactment, to which a State gives the

> force of law, whether it has gone through the usual stages of legislative proceedings, or been adopted in other modes of expressing the will of the State, is a statute of the State within the meaning of the acts of Congress touching our appellate jurisdiction."

From the comparatively recent case of *Reinman vs. Little Rock,* 237 U. S. 171, 176, 59 L. ed. 900, 903, we quote,

> "* * * any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of Judicial Code, 237 (36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, 1214), which confers jurisdiction upon this court. *Atlantic Coast Line R. Co. vs. Goldsboro,* 232 U. S. 548, 555, 58 L. ed. 721, 725, 34 Supt. Ct. Rep. 364, and cases cited."

Also,

> *Grand Trunk etc. Ry. Co. vs. Railroad Comm.,* 221 U. S. 400, 403, 55 L. ed. 786.

From *Railroad Co. vs. McClure,* 10 Wall, 511, 515, 19 L. ed. 997, the following pertinent language is quoted,

> "The Constitution of the United States declares, that no State shall pass a law 'impairing the obligation of contracts.' The constitution of a State is undoubtedly a law within the meaning of this prohibition."

In *New Orleans Gas Co. vs. Louisiana Light Co.,*

115 U. S. 650, 672, 29 L. ed. 516, with reference to the Contract Clause of the Federal Constitution, it is said,

> "A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for, her constitution is a law within the meaning of the contract clause of the National Constitution. *Railroad Co. vs. McClure*, 10 Wall. 511, *Ohio Life Ins. Co. & T. Co. vs. Debolt*, 16 How. 416, 429; *Sedgwick's Stat. & Const. Law*, 637."

Concerning the jurisdiction of this court, under the then existing Judiciary Act, to review the final judgments of the highest court of a state

> "where is drawn in question the validity of a statute or of an authority exercised under any state"

on the ground of repugnance to the Federal Constitution, in *Railroad Co. vs. Rock*, 4 Wall, 177, 181, 18 L. ed. 381, it is held,

> "It must be the Constitution, or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States * * *.

Affirming this holding, in *Knox vs. Exchange Bank*, 12 Wall. 379, 383, 20 L. ed. 414, the court observed,

> "It must be the constitution, or statute, of the State which impairs the obligation of a contract

> or the case does not come within our jurisdiction."

Demonstrating the significance of the elementary proposition that a state constitution is the highest law of the state, many authorities are collected and reviewed in 12 C. J. at page 675.

We have not, in this connection, overlooked the holding in *Ex parte Collins*, 277 U. S. 565, 568, 72 L. ed. 990, 991, that Sec. 380 U. S. C. is inapplicable to suits seeking to enjoin the execution of muncipal ordinances, but it is believed that the following excerpts from that opinion fully differentiates and renders inapplicable to a State Constitution the rule there announced. It is there said,

> "* * * the section does not govern all suits in which it is sought to restrain the enforcement of legislative action, but only those in which the object of the suit is to restrain the enforcement of a statute of general application or the order of a state board or commission."

It also holds that the statute

> "does not apply where, * * * although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved."

To the same effect,

> "Congress realized that in requiring the presence of three judges, of whom one must be a Justice of this court or a circuit judge, it was imposing a severe burden upon the Federal courts. The burden was imposed because Congress deemed it unseemly that a single district judge should have power to suspend legislation enacted by a state."

It is most respectfully submitted that this case, involving as it does questions of constitutional law, national and state, the power of a state to destroy foreign commerce, likewise the construction of a foreign treaty, is a controversy of sufficient dignity and importance to remove it from the doctrine of the Collins case. It will not be disputed that in relative dignity state constitutions and municipal ordinances stand at the extreme polls of the field of written law. It results that the announcement in *Ex parte Collins*, that the jurisdiction of a three judge court, under Sec. 380, U. S. C. does not extend to municipal ordinances or to legislative enactments, where the suit involves matters of comparatively small importance and purely local interest, is without application in this discussion. The far reaching importance, on the other hand, of the questions here involved calls, it is believed, for liberal interpretation and for the favorable exercise of jurisdictional discretion to the end that those questions may be finally set at rest.

II

APPELLANT ENTITLED TO EQUITABLE RELIEF; NO REMEDY AT LAW

(a) Appellees contend (Brief pp. 21, 22), in line with the apparent view of the District Court, that equitable jurisdiction was exercised in *Terrace vs. Thompson,* 263 U. S. 197, 68 L. ed. 255, on the sole ground of claimed peril of criminal prosecution and that it will never be exercised to restrain judicial proceedings for the protection of property rights.

The following excerpt from the opinion clearly indicates the error of that contention and recognizes, on the other hand, the long established doctrine that relief in equity is essentially for the protection of property rights, whereas criminal proceedings are never restrained except as incident to the protection of property.

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

The holding in this regard, in *Terrace vs. Thompson*, was reiterated a little later in *Packard vs. Banton*, 264 U. S. 140, 143, 68 L. ed. 596, 607, from which the following is quoted:

> "But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property.' *Truax vs. Raich*, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1619D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite *Terrace vs. Thompson*, 263 U. S. 197, ante, 255, 44 Sup. Ct. Rep. 15, decided November 12, 1923, where the cases are collected, and state our conclusion that the present suit falls within the exception, and not the general rule."

(b) In the face of the statement beginning at the bottom of page 24 of appellee's brief,

> "We admit that we know of no means by which appellant would be able to institute any action at law in a Federal or state court for the purpose of having determined the issues which it seeks to raise in this action,"

the opposition urge, despite the almost innumerable decisions to the contrary, many of which are cited on pages 12, 24 and 25 of the opening brief, that all constitutional safeguards for the protection of appellant's property and property rights, likewise the established

procedure in the Federal Courts of Equity, are to be considered as satisfied by the fact, as phrased on page 25 of appellees' brief, that

> "In any event, in an action brought by the state in a state court, appellant would be permitted to raise all Federal and state constitutional questions, and would be entitled to an appeal to the state supreme court and by writ of error to come to this court for a decision on all Federal questions, as was pointed out by this court in *Georgia vs. Chattanooga*, 264 U. S. 472, (68 L. ed. 796) and in many other cases."

Georgia vs. Chattanooga, supra, is not in point. That was an original suit in this court by the State of Georgia to enjoin the City of Chattanooga from appropriating for its purposes certain lands in Tennessee owned by the former state. The city of Chattanooga had theretofore commenced condemnation proceedings in a Tennessee court, in which the State of Georgia was named as a defendant, and service on that state, as a non-resident, had been accomplished by publication.

Holding that the sovereignty of the State of Georgia was not extended into the State of Tennessee by virtue of its private ownership, for use in a private capacity, of land in the latter state; that its rights with respect to said land was not greater or different than that of a natural person and did not restrict or modify

the power of eminent domain of the State of Tennessee; that the state court wherein the condemnation suit was pending had jurisdiction; that the bill was totally wanting in equity and that Georgia had a plain, adequate and complete remedy in the *pending* condemnation proceeding, the suit was dismissed.

It does not appear that any state statute was attacked as in conflict with the Federal Constitution and it would seem that the dismissal might very well have been based on Sec. 379, U. S. C., Judicial Code, Sec. 265, providing,

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In the instant controversy no proceeding has been instituted in the state court. On the other hand, pursuant to Sec. 380, U. S. C. it is here sought to prevent a suit which it is admitted appellees will bring unless enjoined therefrom, a distinction so marked that further discussion is believed unnecessary. It should probably be noted, however, that the lack of equity in *Georgia vs. Chattanooga* places it in that regard, and apparently for the same reason, on a plain with *Boise Artesian Water Co. vs. Boise City*, 213 U. S. 276, 53

L. ed. 793, discussed and distinguished on page 18 of the opening brief.

(c) It should also be noted that *Boise Artesian Water Co. vs. Boise City*, as are most of the cases cited by appellees in this connection, was a suit to enjoin the collection of a tax, a form of relief which, because of reluctance to interfere with the fiscal operations of state and municipal governments, Federal courts, in the absence of special circumstances, have refrained from granting, if by payment of the tax under protest the taxpayer may, if thereafter the tax be found to have been illegally exacted, recover in an action at law. Where, in other words, by statute or otherwise, the full amount of the tax so payed may be recovered, it cannot be said that irreparable damage will be suffered in the absence of equitable relief. Hence an injunction will be denied, not strictly on the ground of the existence of an adequate remedy at law but because an avenue is afforded whereby, through the non-judicial step of paying under protest, the taxpayer may fully protect himself against the possibility of any loss whatsoever. Thus in *Henrietta Mills vs. Rutherford County*, 32 Fed. (2d) 570; 572, recently affirmed by this court, 281 U. S. 121, 123, 74 L. ed. 737, 745, it is said,

"The decisions of the Supreme Court indicate

> a proper reluctance to interfere by intervention with the fiscal operations of the state governments, and the federal courts have refrained from doing so when the federal rights of persons could be otherwise preserved. So it has been held that, if a statute of the offending state imposes upon the state officials the duty to refund taxes illegally collected, and confers upon the taxpayer a right to enforce that duty by an action at law, the remedy is adequate, and a suit in equity to enjoin the collection of the tax will not lie."

Examination of the authorities cited in support of the contention that appellant had a plain, adequate and complete remedy at law, too numerous for separate consideration, will show them to be inapplicable here, because it was not shown in those cases that, in the absence of injunctive relief, the complainants would have suffered irreparable loss.

III

ELEVENTH AMENDMENT INAPPLICABLE

In reliance principally, it would seem, on *Fitts vs. McGhee*, 172 U. S. 516, 43 L. ed. 535, it is contended that essentially this is a suit against the State of Washington, in derogation of the 11th Amendment to the Federal Constitution.

Fitts vs. McGhee has been so frequently considered and distinguished in subsequent decisions, with which this court is necessarily intimately familiar, that any

discussion of it by us at this late date would appear to be supererogatory and improper. We venture the suggestion, however, that it does not appear that the state officers against whom the suit was brought in that case were about to institute or had threatened to institute legal proceedings in the state court to enforce obedience to the allegedly unconstitutional state statute—only that third persons had

> "threatened to procure proceedings to be instituted in the courts by the governor and attorney general in the name of the state"

for its enforcement. It was not shown, in other words, that the plaintiff stood in peril of irreparable injury. It was found and adjudged, furthermore, that

> "neither the attorney general of Alabama nor the solicitor of the 11th Judicial District of the state appears to have been charged by law with any special duty in connection with the act of February 9, 1895.

In the instant case, on the other hand, Art. II of the 1921 Statute, which undertakes to forfeit not only lands conveyed to aliens subsequently to that act, but also

> "Land now held by or for aliens in violation of the *constitution* of the state is forfeited to and declared to be the property of the state,"

further provides, by Sec. 8, that

> "It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement."

This duty is also imposed on the attorney general under Remington's Compiled Statute, Sec. 112.

State ex rel Dunbar vs. State Board of Education, 140 Wash. 433, 249 Pac. 996.

Sec. 2, Art. III of the State Constitution provides, furthermore,

> "The supreme executive power of this state shall be vested in a governor, * * *"

and where the attorney general, on request by the governor, refuses to act, the governor may in his own name institute and prosecute necessary legal proceedings.

State ex rel Hartley vs. Clausen, 146 Wash. 588, 264 Pac. 403.

Whatever uncertainty may have existed with respect to *Fitts vs. McGhee,* in cases of this character, has been set at rest by numerous subsequent decisions.

As said in *Truax vs. Raich,* 239 U. S. 33, 37, 60 L. ed. 131, 133, with apparent reference to *Fitts vs. McGhee,* citing many authorities,

> "Whatever doubt existed in this class of cases

was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729."

The following further language from *Truax vs. Raich*, supra, states, it is believed, the established rule,

> "As the bill is framed upon the theory that the act is unconsitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state."

A little later in *Adams vs. Tanner*, 244 U. S. 590, 592, 61 L. ed. 1336, 1342, which originated in the State of Washington and was a suit against the attorney general to enjoin the enforcement of an unconstitutional statute of that state, it is said,

> "Considering the doctrine affirmed in *Truax vs. Raich*, 239 U. S. 33, 60 L. ed. 131, L. R. A. 1916 D, 545, 36 Sup. Ct. Rep. 7, and cases there cited, the record presents no serious question in respect of jurisdiction."

From *Looney vs. Crane Co.*, 245 U. S. 178, 191, 62 L. ed. 230, 236, the following is quoted:

> "There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was, in substance and effect, a suit against

the state, within the meaning of the 11th Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. *Ex parte Young,* 209 U. S. 123, 52 L. ed. 714 13 L. R. A. (N.S.) 932, 28 Supt. Ct. Rep. 441, 14 Ann. Mas. 764; *Western U. Teleg. Co. vs. Andrews,* 216 U. S. 165, 54 L. ed. 430, Sup. Ct. Rep. 286; *Home Telegh. & Teleg. Co. vs. Los Angeles,* 227 U. S. 278, 57 L. ed. 510, 33 Supt. Ct. Rep. 312."

More recent sustaining authorities are cited on pages 21and 22 of the opening brief.

IV

DUE PROCESS AND EQUAL PROTECTION

(a) Under the above head (p. 43, et seq.), also in discussion of the Commerce Clause of the Constitution (pp. 64, 65, 66, 67), much space in appellees' brief is devoted to *Terrace vs. Thompson,* 263 U. S. 197, 68 L. ed. 255, concluding with the broad assertion (p. 67),

> "we believe that case settles all questions raised in this case."

Appellant, on the other hand, makes no quarrel with *Terrace vs. Thompson,* but contends that it has no application whatever to any issue before the court. That case simply holds, as it has been many times previously and subsequently held, that, in the absence

of a treaty to the contrary, a state may on equal terms deny to all aliens the right to own land within its borders, provided, of course, that no sovereign or constitutional right of the Federal Government or persons entitled to its protection is invaded or disregarded, and that the 1921 Statute of the State of Washington, here in question, excluding from land ownership all aliens ineligible to citizenship was, in the respect in which it was there attacked, a proper exercise of the police power and not repugnant to either the Due Process or the Equal Protection Clauses of the 14th Amendment to the Federal Constitution. At no time has appellant disputed these propositions. On the other hand its entire case is bottomed on alleged repugnance to the Federal Constitution of the State Constitution and Statute, and the threatened enforcement thereof by appellees, on entirely different aspects of its constitutional rights.

(b) Appellant's contention, briefly stated, is that as a creature of the State of Washington, a corporate entity under the laws thereof, and a citizen of the state, as held by its highest court,

Hastings vs. Anacortes Packing Co., 29 Wash. 224,

authorized by its charter to own and hold land therein,

it is entitled for itself and its property, equally with every other corporation so created, to the protection of the laws of the land and of the state of its parentage, without regard to the transient circumstance of the unforbidden, not illegal, and, therefore, not judicially controllable ownership at any time of a majority or any portion or part of its capital stock, and that the 1921 State Statute and the closing sentence of Sec. 33, Art. II of the State Constitution, to the contrary in that regard are, in the respect in which appellees admit their purpose to enforce them against appellant and its property, void *ab initio*. As contended on page 45 of the opening brief, being void, the objectionable provision of the State Constitution is without force or affect, did not become a part of appellants charter and does not afford any basis for estoppel, since, as said in *W. W. Cargill Co. vs. Minnesota, etc.*, 180 U. S. 452, 468, 45 L. ed. 619, 626, and *Power Mfg. Co. vs. Saunders*, 274 U. S. 490, 497, 71 L. ed. 1165, 1169,

> "* * * the acceptance of a license in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States,"

a doctrine fully sustained by authority.

Frost vs. Railroad Comm., 271 U. S. 583, 596, 70 L. ed. 1101, 1106;

Williams vs. Standard Oil Co., 278 U. S. 235, 241, 73 L. er. 287, 309;

Hanover etc. Co. vs. Carr, 272 U. S. 494, 517, 71 L. ed. 372, 379.

Appellant further contends that the last sentence of Sec. 33, Art. II of the State Constitution providing that every domestic corporation

> "the majority of the capital stock of which is owned by aliens, shall be considered an alien;"

and disqualified from owning land in the state, together with the corresponding provision, Paragraph (a) of Sec. 1 of the 1921 legislative enactment, are repugnant to the Due Process and Equal Protection Clauses of the 14th Amendment, in that by their terms, dependent on the unrestrainable action of the majority stockholders, they render the property of private corporations subject to confiscation and forfeiture to the state, without the semblance of a hearing or right to be heard in a court of law or equity for the protection of their rights. Not only for the reasons just indicated, are the provisions of the state statute and state constitution, and the threatened action of appellees thereunder, violative of the Due Process

Clauses but they are also, and for the same reasons, violative of the Equal Protection Clause, in that, while retaining unimpaired its standing as a legal entity, a corporation through the transfer to aliens of a majority of its stock, is subjected to penalties to which other corporations in like standing are wholly immune.

It has already been shown, that in so far as the 1921 Statute is broader in its terms than the parent constitutional provision, it also, with respect to previously acquired property, violates the Contract Clause of the Constitution, while the invalidity of both the State Constitution and the State Satute, under the Commerce Clause of the Federal Constitution, will be discussed under another head.

Erroneously, on page 64 of their brief, appellees suggest that it was held in *Terrace vs. Thompson, supra,* that, consistently with the Due Process and Equal Protection Clauses, a state may deprive an alien of the right thereby guaranteed to him to engage in a useful and customary occupation and speciously inquires, on that false postulate,

> "Why may the state not by the same means, deprive him of his right to engage in interstate commerce?"

The suggestion is based on an erroneous interpretation of the decision in *Terrace vs. Thompson,* which

instead of holding that a state may deprive an alien of the right to engage in and earn a living in the customary occupation is predicated on a wholly different concept, as appears by the following excerpt from the opinion.

> "It was said (*Truax vs. Raich*, 239 U. S. 33, 37, 60 L. ed. 131, 133) that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the 14th Amendment to secure.
>
> In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state."

(c) Likewise without application is *Frick vs. Webb*, 263 U. S. 326, 68 L. ed. 323, sustaining a California statute forbidding ownership by aliens of stock in a private corporation authorized by its charter to acquire title to land in that state. The distinction is immediately obvious. Under the Washington law acquisition and ownership by an alien of stock in a real estate or land owning corporation is in no wise forbidden, though the penalty of forfeiture is visited on the corporation and the helpless minority stockholders should a majority of the stock at any time pass to alien ownership, the corporation itself remaining afoot the meanwhile as a duly authorized entity under the

general corporation laws of the state. This distinction points directly to the basis of appellant's contention that Sec. 33, Art. II of the State Constitution and the 1921 Statute are repugnant to the Due Process and Equal Protection Clauses of the 14th Amendment.

V

DESTRUCTION OF FOREIGN COMMERCE NOT JUSTIFIED UNDER POLICE POWER

(a) On authority of *Terrace vs. Thompson*, 263 U. S. 197, 68 L. ed. 255, and related cases, announcing the general doctrine that in the exercise of its police power a state many deny to aliens the right to own land within its borders, and on the further premise (appellees' brief, p. 63) that states have certain regulatory powers over interstate carriers with respect to purely local matters, though interstate commerce be thereby incidentally affected, the validity of the 1921 Statute and the corresponding state constitutional provision is sought to be sustained to the point of justifying the destruction of foreign commerce.

That in the absence of affirmative action by Congress a state, in the exercise of its reserve powers, may enact laws for the protection of the public health, the public morals and the public safety, is not, of course, open to question.

Field vs. Barber Asphalt Pav. Co., 194 U. S. 618, 48. L. ed. 1142;

Crossman vs. Lurman, 192 U. S. 189, 48 L. ed. 401;

Pennsylvania Ry. Co. vs. Hughes, 191 U. S. 477, 48 L. ed. 269;

Caldwell vs. North Carolina, 187 U. S. 622, 47 L. ed. 336.

The initial vice of appellee's contention is the failure to recognize this distinction. As observed in *Oregon-Washington R. & Nav. Co. vs. Washington*, 270 U. S. 87, 101, 70 L. ed. 482, 488,

> "In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress."

The reference in the last sentence, of the language just quoted, is made clear by the following from *Missouri ex rel Barrett vs. Kansas Natural Gas Co.*, 265 U. S. 298, 307, 68 L. ed. 1027, 1030, and squarely adapts the rule to the instant controversy.

> "In the absence of congressional legislation, a state may constitutionally impose taxes, enact inspection laws, quarantine laws, and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce.

Pennsylvania R. Co. vs. Hughes, 191 U. S. 477, 488-491, 48 L. ed. 268, 272, 273, 24 Sup. Ct. Rep. 132. But the commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce."

(b) The power delegated to the Federal Government to regulate commerce between states and foreign nations is an attribute of sovereignty, from which it necessarily results that as against the exercise of that sovereignty in its proper sphere the police power a state presents no obstacle. As said in *Lacoste vs. Department of Conservation,* 263 U. S. 545, 549, 68 L. ed. 437, 440,

> "A state may not enforce any law, the necessary effect of which is to prevent, obstruct, or burden interstate commerce.

The doctrine for which we contend is impressively stated in the following excerpt from *Mackenzie vs. Hare,* 239 U. S. 299, 311, 60 L. ed. 297, 301,

> "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hestitate long before limiting or embarrassing such powers."

Kansas City Southern R. Co. vs. Kaw Valley Drainage Dist., 233 U. S. 75, 79, 58 L. ed. 857, 859, hold-

ing that it is not within the jurisdiction or power of a state court to order the removal of a bridge forming a necessary part of an interstate railroad, is believed to be directly in point.

> "The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interfence by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a state could not stop the operation of the lines by an injunction for failure to pay taxes. * * * It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute, now Rev. Stat. 5258, U. S. Comp. Stat. 1901, p. 3564. And so it is held. * * * The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' * * * To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarin or the export of natural gas."

Quite close to the issue is the holding in *United States vs. Rio Grande Dam & I. Co.*, 174 U. S. 690, 709, 43 L. ed. 1136, 1144, that notwithstanding the

general power of a state to control and appropriate all waters within its borders for the use and enjoyemnt of its citizens, such appropriation must be with due regard for interstate commerce and in a manner not to interrupt or obstruct such commerce, though the stream immediately involved be itself non-navigable, if by its depletion the navigability of the stream into which it flows be imperiled. In the course of an extended opinion, by way of illustration, it is there said,

> "Unquestionably the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney-General to institute proceedings to restrain such appropriation."

The following excerpt from the comparatively recent opinion by Mr. Justice Holmes in *Sanitary District of Chicago vs. United States,* 266 U. S. 405, 426, 69 L. ed. 352, 363, citing with approval *Kansas City South-*

ern R. Co. vs. Kaw Valley Drainage Dist., supra, strongly sustains appellant's contention.

> "As to its ultimate interest in the lakes, the reasons seem to be stronger than those that have established a similar standing for a state, as the interests of the nation are more important than those of any state. * * * In matters where the states may act, the action of Congress overrides what they have done. * * * But in matters where the national importance is imminent and direct, even where Congress has been silent, the states may not act at all."

The doctrine for which appellant contends is no where more strongly stated than by Mr. Chief Justice Marshall in the great case of *McCulloch vs. Maryland*, 4 Wheat, 316, 405, 4 L. ed. 579,

> "If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the State legislatures, and the

officers of the executive and judicial departments of the States, shall take the oath of fidelity to it."

(c) The suggestion at page 67 of appellees' brief that the questions here raised under the Commerce Clause of the Constitution are settled by the decision in *Terrace vs. Thompson, supra,* is obviously without merit. The Commerce Clouse is not mentioned in the opinion and was in no sense involved in that litigation.

With a view to bringing Nakatsuka within the protection of the treaty between the United States and Japan, under an amended complaint, the contention was made that Nakatsuka was

> "engaged in the business of trading, wholesale and retail, in farm products and shipping the same in interstate and foreign commerce,"

and desired to continue to produce his own farm products for the purpose of selling them in such wholesale and retail trade which he would not be able to do if prevented from leasing land for the purpose of producing farm products for such trade. The court said,

> "We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens or

subjects of either in the territories of the other. The right to 'carry on trade' or 'to own or lease and occpy houses, manufactories, warehouses, and shops,' or 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade,' cannot be said to include the right to own or lease, or to have any title to or interest in, land for agicultural purposes. The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes."

That *Terrace vs. Thompson* has no casual bearing on any question in this controversy, under the Commerce Clause of the Constitution, is too clear for extended discussion.

Omission further to amplify here other questions advanced in the opening brief is not to be taken as a waiver in any sense of those contentions.

Respectfully submitted,

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No. 66.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1930.

NORTHPORT POWER AND LIGHT COMPANY, a corporation, Appellant,

v.

ROLAND H. HARTLEY, as Governor, of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLEES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLEES

STATEMENT.

As appears from the complaint, plaintiff (appellant here), is a corporation organized under the laws of the state of Washington, a majority of its capital stock being owned by the West Kootenay

Power & Light Company, Ltd., of Canada, an alien corporation. It was organized in the year 1917 and was empowered by its articles of incorporation to engage in the generation and distribution of electrical current for power and light purposes. Shortly after it was organized, it obtained conveyances for a right-of-way and easement for the erection and maintenance of a power transmission line from a point three miles north of the Canadian border southerly to the town of Northport and certain nearby mining claims which it is developing, in Stevens county, Washington. Prior to and at the time of the commencement of this action, it was securing electric current from across the Canadian border and transmitting it on its power lines from thence to the town of Northport, where it was furnishing municipal light, and to its mining properties for use in their development.

Plaintiff commenced this action against the governor and attorney general of the state of Washington in the United States District Court of Washington, seeking to enjoin them from instituting an action in the state court to escheat its power lines, easements and rights-of-way on the ground that its ownership thereof was prohibited by a provision of the Washington State Constitution and an act passed by the legislature of the state of Washington in the year 1921, prohibiting the ownership of lands in the state of Washington by an alien, or by a corporation when a majority of the stock of the corporation is of alien

ownership. It is alleged in the complaint that the section of the constitution of the state of Washington and the act of 1921 in question are in contravention of and repugnant to the Commerce Clause, the Contract Clause, the Due Process and Equal Protection Clauses of the Federal Constitution; and the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

An application was made by plaintiff for a temporary injunction, and a motion to dismiss was filed by defendants. After a hearing thereon before Judge Dietrich of the 9th Circuit Court of Appeals and Judge Bourquin and Judge Cushman, district judges, the court unanimously denied the application for an interlocutory injunction and dismissed the action upon the ground that as plaintiff had a plain, adequate and complete remedy at law the district court had no jurisdiction. From the judgment and decree of dismissal, plaintiff appealed direct to this court under section 266 of the United States Judicial Code.

SUMMARY.

POINTS AND AUTHORITIES.

I.

The United States Court had no jurisdiction of the subject matter of the action, because—

(a) Appellant had a plain, adequate and complete remedy at law.

Section 267 U. S. Jud. Code, Section 384, U. S. C. A.;

Cable v. U. S. Life Ins. Co., 191 U. S. 288;

Boise Artesian Water Co. v. Boise City, 213 U. S. 276;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;

Dalton Adding Machine Co. v. State Corp. Com., 236 U. S. 699;

Toop v. Ulysses Land Co., 237 U. S. 580;

Cavanaugh v. Looney, 248 U. S. 453;

Amer. Mills Co. v. Amer. Surety Co., 260 U. S. 360;

Georgia v. Chattanooga, 264 U. S. 472;

Thompson v. Schwaebe, (9th C. C. A.), 22 Fed. (2nd) 518;

New York Life Ins. Co. v. Marshall, (5th C. C. A.), 23 Fed. (2nd) 225.

(b) This action is in effect a suit against the State of Washington and is prohibited by the 11th Amendment to the United States Constitution. Although the state is *eo nomine* not a party, it is the real party in interest. The action is brought against the governor and the attorney general to enjoin them as state officials from instituting an action at law in

a state court. Any such action would necessarily be in the name of and for the sole use and benefit of the state.

Hagood v. Southern, 117 U. S. 52;
In re Ayers, 123 U. S. 443;
North Carolina v. Temple, 134 U. S. 22;
Fitts v. McGhee, 172 U. S. 516;
Minnesota v. Hitchcock, 185 U. S. 373;
Farmers' Natl. Bank of Hudson v. Jones, 105 Fed. 459;
Central of Georgia Ry. v. McLendon, 157 Fed. 961;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 91;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94;
Robertson v. H. Weston Lumber Co., 87 So. (Miss.) 120;
State ex rel. Gordon v. State Board of Control, 102 S. E. (W. Va.) 688;
Red Star Line v. Baughman, 139 Atl. (Md.) 291.

(c) There is no diversity of citizenship to confer jurisdiction, appellant being a domestic corporation and the state not being a citizen within the meaning of the constitution and acts of Congress, therefore, the only grounds on which jurisdiction could be retained would be that a Federal question is presented.

Minnesota v. Northern Securities Co., 194 U. S. 48.

(d) It cannot be seriously urged that a Federal question is involved in the case which was not settled

adversely to contention of appellant in case of *Terrace v. Thompson*, 263 U. S. 197, involving the same constitutional and statutory prohibitions against alien ownership of lands in Washington. The 1921 act (ch. 50, L. '21) should be left out of consideration as two decisions of the Washington supreme court have decided that that act would not apply to conveyances or transactions occurring prior to its enactment. (*State v. Natsuhara*, 136 Wash. 437; *State v. Motomatsu*, 139 Wash. 639.) Appellant takes this view in its brief on pages 28 and 29, and we agree with the view. Therefore, the case should be determined under the state constitution and in disregard of the statute, and as the constitution was in effect in 1889, long prior to the year 1917 when appellant obtained its conveyances of the land in question, no Federal question can be made to rest on the alleged violation of the Contract Clause of the Federal Constitution; nor, does the alleged violation of the Commerce Clause present a Federal question which was not in principle settled in *Terrace v. Thompson*, 263 U. S. 197. That case held that the right of an alien to engage in occupation and the right of a citizen to dispose of and deal with his land were subject to the right of the state to prohibit leasing of land to an alien, and that the Due Process and Equal Protection clauses of the Federal Constitution were not violated by such a prohibition; therefore, the Commerce Clause is of no greater effect against the state's right to prohibit alien ownership than the Due Process or

Equal Protection clauses. For these reasons no Federal question with merit is presented.

(e) The claimed violation of the treaty of 1815 between the United States and Great Britain, as extended and continued by the treaty of 1827, so patently applies to the territories of Great Britain in Europe and not to Canada as to amount to a frivolous claim; furthermore, even if the provisions of the treaty did apply to Canada, there is nothing to show that appellant, as a corporation of Washington, is in anywise, as a subject of Great Britain, or otherwise, entitled to any rights or protection under the treaty.

Toop v. Ulysses Land Co., 237 U. S. 580.

Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers 1776-1909, by Malloy, Vol. 1, page 625; 8 U. S. Stat. at Large, pp. 228, 360.

(f) This appeal is taken direct to this court from the decision of the U. S. District Court, under section 266 of the Judicial Code. As the only question before the court is whether a provision of the Washington constitution is valid, the act of 1921, having no application, as is conceded by both parties to the appeal, section 266 of the Judicial Code has no application and cannot sustain this appeal, as that section relates only to an alleged unconstitutional state statute. No direct appeal is allowed to this court in an action attacking as invalid a provision of a state constitution.

II.

An alien, or a corporation of which a majority of its capital stock is owned by aliens, is prohibited from owning lands in the state of Washington.

Article II, section 33, Washington State Constitution;

State ex rel. Winston v. Morrison, 18 Wash. 664;

State ex rel. Winston v. Hudson Land Co., 19 Wash. 85;

State ex rel. Morrell v. Superior Court, 33 Wash. 542.

III.

The state's sovereignty over real property within its borders is supreme. It may prohibit alien ownership and may provide by statute the method by which ownership may be acquired, retained and lost and generally all questions regulating rights and interests therein and devolution of title. The only restriction on the power of the state in this respect is that rights safeguarded by treaty shall not be violated.

United States v. Fox, 94 U. S. 315;
Hauenstein v. Lynham, 100 U. S. 483;
De Vaughan v. Hutchinson, 165 U. S. 566;
Blythe v. Hinckley, 173 U. S. 501;
Munday v. Wisconsin Trust Co., 252 U. S. 499;
Heck v. Nichols (8th C. C. A.), 6 Fed. (2d) 10;
State v. O'Connell, 121 Wash. 542;
1 Ruling Case Law, 806.

IV.

Under the police power the state may prohibit ownership of lands by aliens or by a corporation, a majority of the stock of which is owned by aliens. Such laws are enacted under the police power and do not violate the Due Process and Equal Protection Clauses of the Federal Constitution, and consequently should not be held to violate the Commerce Clause or Contract Clause of the Constitution. The only limitation of the state's power in this respect is that the prohibition shall not transcend the rights of aliens given by treaty.

Terrace v. Thompson, 263 U. S. 197;
Terrace v. Thompson, 274 Fed. 841;
Porterfield v. Webb, 263 U. S. 225;
Webb v. O'Brien, 263 U. S. 313;
Frick v. Webb, 263 U. S. 326;
State v. O'Connell, 121 Wash. 542.

The Commerce Clause does not prohibit the state, under its police powers, from enactments affecting interstate commerce.

Mugler v. Kansas, 123 U. S. 623;
Kidd v. Pearson, 128 U. S. 26;
Fritts v. Palmer, 132 U. S. 282;
Postal Telegraph Cable Co. v. Adams, 155 U. S. 688;
Geer v. Conn., 161 U. S. 519;
Henderson Bridge Co. v. Ky., 166 U. S. 150;
Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611;
New York, ex rel. Silz v. Hersterberg, 211 U. S. 31;
Sligh v. Kirkwood, 237 U. S. 52;

Interstate Amusement Co. v. Albert, 239 U. S. 560;
St. L. I. M. & S. R. Co. v. Ark., 240 U. S. 518;
Gulf C. & S. F. R. Co. v. Tex., 246 U. S. 58;
Munday v. Wisconsin Trust Co., 252 U. S. 499;
O. W. R. & N. Co. v. Wash., 270 U. S. 87.

V.

Although we think the case should be decided solely upon the effect of the Washington constitutional provision, and not the statute, in which event the Contract Clause could not be involved because the conveyances were made subsequent to the adoption of the Washington constitution, still, if considered under the statute, the statute having been enacted under the police power of the state, the Contract Clause must yield to a valid exercise of the police power.

Terrace v. Thompson, 263 U. S. 197;
Terrace v. Thompson, 274 Fed. 841;
Union Dry Goods Co. v. Georgia Pub. Service Corp., 248 U. S. 372;
Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548;
Manigault v. Springs, 199 U. S. 473;
Marcus Brown Co. v. Feldman, 256 U. S. 170;
Levy Leasing Co. v. Siegel, 258 U. S. 242;
Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330;
State ex rel. Pratt v. Seattle, 73 Wash. 396.

VI.

The rights and interests in real estate acquired by appellant and the conveyances made to it are per-

petual easements of a right of way in definitely described lands for the construction, maintenance and operation of its power lines, and as such, constitute an interest in and ownership of real estate prohibited under the constitution of Washington to a corporation with a majority of its stock owned by an alien.

State ex rel. Winston v. Morrison, 18 Wash. 664;

State ex rel. Winston v. Hudson Land Co., 19 Wash. 85;

State ex rel. Morrell v. Sup. Court, 33 Wash. 542;

Moeller v. Gormley, 44 Wash. 465;

Humphrey v. Krutz, 77 Wash. 152;

Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co., 102 Wash. 608;

United States v. Welch, 217 U. S. 333;

Western Union Tel. Co. v. Georgia R. & B. Co., 227 Fed. 276;

Sims v. Fletcher Savings & Trust Co., (Ind.) 142 N. E. 121;

Tide-Water Pipe Co. v. Bell, (Pa.), 124 Atl. 351;

Wyatt v. Larimer & Weld Irr. Co., (Colo.) 33 Pac. 144;

Cook v. The C. B. & Q. R. Co., 40 Ia. 451;

Goodrich v. Burbank, 12 Allen (Mass.) 459.

VII.

The Treaty of Commerce & Navigation between the United States and Great Britain, proclaimed December 22, 1815, as extended and continued by the treaty of 1827, as will appear from its positive terms, does not afford any rights to any subjects or terri-

tories of Great Britain except its European territories; and in any event appellant, although declared an alien because a majority of its stock is owned by an alien corporation, is not declared an alien of any particular foreign nation, and does not show that either as a corporation, or through any other corporation or individuals, or otherwise, that it is entitled to any rights under this treaty, or any other.

8 U. S. Stat. at L. 228, 360—Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909, by Malloy, pp. 624, 645;

Complaint, par. VII (Rec. p. 3).

ARGUMENT.

JURISDICTION.

The motion to dismiss (Rec. p. 55) was on the following grounds:

1. Said bill of complaint does not state any matters of equity entitling plaintiff to the relief prayed for;

2. Said bill of complaint does not state facts sufficient to entitle plaintiff to any relief against these defendants, or either of them;

3. The plaintiff has a plain, adequate and complete remedy at law.

The decree of dismissal (Rec. p. 63) was granted upon the grounds set forth therein that the court had no jurisdiction of the action because it appeared from the complaint that plaintiff had a plain, adequate and complete remedy at law.

The decision of the three judges (35 Fed. 2nd, 199) (Rec. p. 55) was based on the case of *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, and *Cavanaugh v. Looney*, 238 U. S. 453.

The *Boise* case was an action by a corporation to enjoin certain city officials of the city of Boise from enforcing an ordinance levying a tax against the corporation for the privilege of maintaining water pipes in the city streets. It was claimed that the city was threatening to remove the pipes and works of the corporation, and that the threats cast a cloud upon the company's franchise; that it impaired

the obligation of a contract made between the corporation and the city by previous ordinances and that the enforcement of the ordinance would deprive the company of its property without due process of law, and abridge the privileges and immunities granted by the 14th amendment. The court, on page 281, says:

"It is obvious that the rights of which the company seeks to avail itself are cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contention is that the imposition of the license fee was illegal, unconstitutional and void. All these contentions are open in a court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate and complete remedy at law."

In *Cavanaugh v. Looney*, 238 U. S. 453, the jurisdiction of the court was sought to enjoin the University of Texas from instituting an action at law to condemn a tract of land for the use of the university. The special court assembled as provided by section 266, Judicial Code, denied the application for a preliminary injunction and allowed a direct appeal. The land owner asserted that the legislative act under which the state was proceeding with the condemnation violated both state and Federal constitutions and that the filing of the petition for condemnation would cause irreparable loss and damage. The court, on page 456, says:

"When considered in connection with established rules of law relating to the power of eminent domain, complainant's allegation of threatened 'irreparable loss and damage' appears fanciful. The total circumstance negatives such view and rather tends to

support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny the Federal right, an appropriate and adequate remedy by review here is obvious."

In *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, the company sought to restrain the collection of taxes levied by the city and county of Denver, state of Colorado, and asserted that to enforce the collection of such taxes would be violative of certain provisions of the Constitution of the United States. The action was dismissed in the district court and on the appeal to the Circuit Court of Appeals, that court held that there was an adequate remedy at law and affirmed the decree from which the appeal was taken to this court. On page 484 the court says:

"In the courts of the United States it is a guiding rule that an appeal in equity does not lie in any case where plain, adequate and complete remedy may be had at law. The statute so declares (Rev. Stat. Sec. 723) and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*."

In the case of *Dalton Adding Machine Company v. State Corporation Commission*, 236 U. S. 699, a Missouri corporation sought to enjoin the Virginia officials from enforcing a state statute requiring foreign corporations doing business in the state to ob-

tain a license. The company contended that its business in Virginia was wholly interstate and that the actions of the Virginia officials would violate the Commerce Clause of the Federal Constitution. The appeal to this court was from an order of three judges denying a preliminary injunction. On page 701 the court says:

"The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule."

The case of *Georgia v. Chattanooga*, 264 U. S. 472, was an original action in this court by the state of Georgia to enjoin the city of Chattanooga from prosecuting in the court of Tennessee proceedings to condemn part of a railroad yard owned by that state in that city. It was contended by Georgia that the condemnation suit under which proceedings were to be taken did not afford Georgia and other owners reasonable notice and opportunity to be heard before the final determination of judicial questions that might be involved in the condemnation proceedings, e. g., whether the statute had delegated to the state the power to condemn and whether the taking was for a public purpose. On page 483, the court says:

"The plaintiff's (Georgia's) objections and defenses may be interposed in the Tennessee court. It appears on the face of the bill of complaint that, if it so elects, Georgia has a plain, adequate and complete remedy in the condemnation proceedings instituted

by the city. Its contention that the requisite power to condemn has not been delegated to the city involves a consideration of the meaning and proper application of the laws of Tennessee, and it is especially appropriate that the Tennessee courts shall first decide the question. * * * If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review. That suits in equity will not be sustained in any case where a plain, adequate and complete remedy may be had at law is declared by statute (Jud. Code, sec. 267) and established by decisions of this court so numerous that citation is not necessary."

See also to the same effect:

Cable v. U. S. Life Insurance Company, 191 U. S. 288;

Thompson v. Schwaebe, (9 C. C. A.) 22 Fed. (2d) 518;

New York Life Ins. Co. v. Marshall, (5 C. C. A.) 23 Fed. (2d) 225.

Although this court in *Terrace v. Thompson*, 263 U. S. 197, sustained the jurisdiction of the United States District Court to entertain a suit for injunction against the enforcement of the anti-alien land law of Washington (chap. 50, L. 1921), Mr. Justice McReynolds and Mr. Justice Brandeis, although concurring in the decree of the district court dismissing the action, added that in their opinion "there is no justiciable question involved and that the case should have been dismissed on that ground." The court sustained the jurisdiction of the court in that case, but it did so on the ground that in order for the complainant to obtain a remedy at law, it would be

necessary for them to consummate the proposed lease which the threatened enforcement of the law deterred, and that even if they would take the risk of a fine and imprisonment and loss of property they must continue to suffer the deprivation of their right to dispose of or lease their lands to any alien, until one could be found who would join with them in violating the terms of the statute and taking the risk of forfeiture, and that in the meantime the Japanese must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who would be willing to make a forbidden transfer of land and take the risk of punishment. In the case now before the court, no such risks or threats face the appellant, no fines or penalties are threatened and no action is threatened except an action in a state court in which, as has been pointed out in the quotations above, the appellant would be able to assert any and all constitutional objections and rights, and which would afford it a complete, adequate, practical and efficient remedy at law. Therefore, *Terrace v. Thompson*, 263 U. S. 197, although sustaining jurisdiction in that case, shows clearly that no jurisdiction obtains in the case at bar by reason of the difference in the facts of the two cases.

We deem it unnecessary and hardly worth while to take each of the cases cited by appellant on pages 11 to 25 of its brief to sustain its claim of jurisdiction in the Federal Court, and, by an analysis of the facts, prove that they are not controlling. Generally, the

cases cited involve actions to enjoin the collection of taxes and special assessments imposed by state authorities which created a lien upon the property of the plaintiff and in which no remedy was afforded by paying the taxes under protest and recovering the same in an action at law; or actions in which a multiplicity of suits was avoided; or actions enjoining statutes or orders fixing public utility rates alleged to be confiscatory; or actions to prevent the revocation of franchise rights and the establishment of a competitive business, or actions to prevent the enforcement of an alleged unconstitutional criminal law where a property right was involved and the penalties were severe.

In all of such cases, where diversity of citizenship exists and the proper amount is involved, or where a Federal question is involved, the jurisdiction of the United States Court has become settled beyond dispute.

The case at bar does not fall within the class of any of such cases. Here there is no multiplicity of suits threatened or avoided; there has been no action taken and none threatened which will interfere with any property rights of appellant until after an adjudication in a court of law that such action may be legally taken; there is no threat of any enforcement of a criminal statute in which excessive fines and penalties may be invoked. Although in some parts of its brief appellant argues on the assumption that the state officials were about to physically enter upon

and take possession of its property, without taking any court action, such is not the case, the allegations of the complaint being that a law action of escheat is threatened. It is on this assumption that appellant attempts to distinguish the cases cited in the Federal District Court decisions (*Boise Artesian Water Co. v. Boise City*, 213 U. S. 276; *Cavanaugh v. Looney*, 248 U. S. 453). We submit that the only phases before the court are the allegations of the complaint to the effect that the state officials had threatened to institute in the state court escheat proceedings. On this state of facts no irreparable damage or injury can be inflicted upon appellant or its property or rights, and no action can or will be taken with respect to any ouster proceedings except by an action in a law court of the state in which appellant will be afforded full opportunity to contest the propriety and legality of the statute and the threatened action.

We admit that in some of the cases cited by appellant it has been stated that an adequate remedy at law must exist in the Federal court, and in one, a decision by a United States District judge (*Fredenberg v. Whitney*, (Wash.) 240 Fed. 819) that the legal remedy must be one that plaintiff may institute. In some of the cases cited by appellant it was stated that for an adequate remedy at law to exist it must exist in a Federal court, and in others, that if the action is brought in equity, and an adequate remedy was available in law, the action should be transferred to the law side of the court. We admit that we know

of no means by which appellant would be able to institute any action at law in a Federal or state court for the purpose of having determined the issues which it seeks to raise in this action, nor do we believe that the decision of the district judge in *Fredenberg v. Whitney*, 240 Fed. 819, to that effect, is consistent with the many decisions of this court denying to the United States courts equity jurisdiction; nor do we know of any means by which this action may be transferred to the law side of the Federal court; nor do we wish to admit that if the action were instituted by the state in a state court that it could be removed to the Federal court, but it probably could, provided it could be made to appear that a meritorious constitutional question was involved, and if this be true, the objection would be met that, as stated in one or two of the cases cited by appellant, the remedy at law should be one available to the plaintiff in a Federal court. In any event, in an action brought by the state in a state court, appellant would be permitted to raise all Federal and state constitutional questions, and would be entitled to an appeal to the state supreme court and by writ of error to come to this court for a decision on all Federal questions, as was pointed out by this court in *Georgia v. Chattanooga*, 264 U. S. 472, and in many other cases.

FEDERAL QUESTION.

We believe that a careful consideration of the issues raised by the complaint and the motions to dis-

miss will show that no substantial reason exists for urging that a Federal question or a treaty right is seriously involved in this proceeding. The complaint alleges that the governor and attorney general had threatened to institute escheat proceedings in the state court against appellant under section 33, article II of the state constitution, and under the provisions of chapter 50, Laws of 1921, prohibiting ownership of lands by an alien or by a corporation in which the majority of its capital stock is owned by an alien, and alleges that such action will be in violation of the rights and protection guaranteed appellant under the Commerce Clause, the Contract Clause and Due Process and Equal Protection Clauses of the United States Constitution and the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

In the case of *Terrace v. Thompson*, 263 U. S. 197, this court had before it for consideration the same state constitutional provision and the same statute, and in that case it was held that the state, under its police power, reserved at the time of the adoption of the constitution, in the absence of any treaty provision to the contrary, had power to deny to aliens the right to own land within its borders and that the particular provision of the constitution and the particular statute assailed in the case at bar were not in violation of the Due Process or Equal Protection clauses of the Fourteenth Amendment. We submit that if this constitutional provision and this statute

do not violate the Due Process or Equal Protection Clauses of the United States Constitution, how, we ask, can it seriously or in good faith be contended that it violates the Commerce Clause or the Contract Clause of the United States Constitution? As to the Contract Clause, we believe that it is not in any sense involved because it is idle to assume, although it is alleged, that the state will proceed to enforce the provisions of chapter 50, Laws of 1921, in the face of two decisions of the highest court of the state (*State v. Natsuhara*, 136 Wash. 437, and *State v. Motomatsu*, 139 Wash. 639) that that statute has no retroactive effect and does not apply to conveyances or rights secured prior to the time it took effect on June 8, 1921. The appellant's conveyances and property rights were secured in the year 1917. The view that the statute should be given no consideration is taken by appellant on pages 28 and 29 of its brief, and this view is concurred in by appellees. This leaves the Contract Clause entirely out of consideration.

In view of the fact that this court has unqualifiedly sustained the Washington constitutional provision and statute against an attack based on violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, we are unable to see how it can seriously be contended that the constitutional provision or statute violates the Commerce or Contract Clauses of the United States Constitution. For these reasons we believe the district court was without any jurisdiction in the premises, as the con-

stitutional ground is the only ground on which any jurisdiction could be ~~raised~~, there being no diversity of citizenship.

TREATY.

As to the claimed violation of treaty rights, we see no ground for that contention. Article 1 of the treaty, following the preamble, reads as follows:

"There shall be between the territories of the United States of America, and all the territories of His Britannick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

This provision in no manner affords any protection to a Canadian subject or applies to Canadian territory. Its operations are limited to the territories of Great Britain in Europe. Appellant makes the contention on pages 63 and 64 of its brief that, because the concluding paragraph of article II of the treaty provides that "intercourse between the United States and his Britannick Majesty's possessions in the West Indies and on the continent of North America shall not be affected by any of the

provisions of this article," every other part of the treaty should apply to the Dominion of Canada. This, in the face of the express provisions of article I of the treaty that it applies only to the territories of Great Britain in Europe. Article I is the only provision of the treaty, if any, in which the subject matter of the treaty in anywise affects appellant. Furthermore, it seems plain that, in any event, even if Canada were expressly named in the treaty and expressly brought within its provisions, it would afford no protection to appellant. Article I of the treaty confers four rights on British subjects: (1) Liberty freely and securely to come with their ships and cargoes; (2) to remain and reside in United States territory; (3) to hire and occupy houses and warehouses for the purposes of their commerce; and (4) merchants and traders are granted protection and security for their commerce. This treaty clearly refers to commerce by water and is not intended to grant any rights with respect to any other commerce. This would naturally be the purpose of the treaty in view of the fact that it expressly states that it applies to British European territories and the United States, which are of course separated by water; and the use of the word "commerce" therein undoubtedly relates to such commerce as may be carried on between the inhabitants of the two nations by water. But, even if the word "commerce" as there used should apply to the definition of that term a century and a quarter after the treaty was adopted, still, commerce is men-

tioned only in two clauses. In one of such clauses it gives the inhabitants of the contracting parties the right to hire and occupy houses or warehouses for the purpose of their commerce. No house or warehouse used by appellant is involved in this action and no right to use a house or warehouse used for commerce is claimed to be affected by any threatened action of the state in this case. The other clause of article I of the treaty which mentions commerce gives to merchants and traders of each nation the right to enjoy the most complete protection and security for their commerce. As to that provision, we submit that appellant is in no sense a merchant or a trader or subject to or entitled to any protection under that clause.

Furthermore, it should be borne in mind that appellant is a corporation organized under the laws of Washington, with a majority of its stock owned by an alien corporation. Such a corporation is, for the purpose of the state constitutional provision declared to be an alien. But it is not declared to be an alien of any particular nation. The complaint (Par. VII; Rec. p. 3) shows that the majority of the capital stock is owned by the "West Kootenay Power and Light Company, Ltd., of Canada, an alien corporation." This allegation does not show that the corporation is a Canadian corporation, and does not show that it was organized under the laws of any particular nation. Appellant seems to assume that by virtue of this allegation it is a Canadian and consequently a British subject and in some manner afforded some

rights and protection by the British treaty, but assuming that the treaty would afford rights to subjects of Great Britain to organize a corporation to carry on such commerce as is within the protection of the treaty, appellant in no sense shows that it is a subject of Great Britain and entitled to any rights under the treaty.

Therefore, it being so patent that Canadian territory was in no event covered by the treaty of 1815, and that, if it were, appellant is not within any of the protected rights of the treaty, we feel absolutely safe in saying that, in so far as the jurisdiction of the court rests on the claim that a treaty right is involved, such a claim is fanciful and wholly untenable, and therefore jurisdiction could not with a show of sincerity be predicated on the violation of a treaty right.

Section 266, Judicial Code.

The prosecution of this action proceeded under section 266 of United States Judicial Code (sec. 380, U. S. C. A.). An application was made for an interlocutory injunction. Upon the hearing the interlocutory injunction was denied and the action dismissed on the grounds that the court had no jurisdiction because it appeared to the court that plaintiff had an adequate remedy at law. Following the hearing a decree of dismissal was entered and an appeal taken direct to this court. We have already referred to the fact and shown why the issues of this case should be

determined as if the only power the state or state officials have for any threatened escheat proceedings is that conferred by section 33 of article II of the Washington state constitution.

This appeal is taken direct to this court under section 266 of the U. S. Judicial Code, which permits a direct appeal when actions are brought to enjoin the enforcement or execution of an alleged unconstitutional state *statute*, and not on the ground of any action threatened under a provision of a state constitution. We realize that in pressing this point we are asking the court to ignore the allegations of the complaint to the effect that the state officials have threatened to enforce the provisions of the statute, and that the allegations of the complaint are ordinarily deemed to be admitted by the filing of a motion to dismiss, but we feel that we are justified in asking the court to do this in view of the fact that appellant takes the position in its brief that the case should be decided on the basis of the state constitutional provision and not on the statute, and that appellees concur in this view. If this be treated as an action to enjoin the state officials from enforcing a state constitutional provision, no direct appeal would lie to this court under the provisions of section 266 of the Judicial Code.

Eleventh Amendment.

This action is in effect an action against the state of Washington prohibited in a Federal court by the Eleventh Amendment to the United States constitu-

tion. This point was not urged in the district court, but it is our understanding that we are privileged to ask that the decision of the court be sustained on any ground upon which it might have been rested. Furthermore, we take it that a question of jurisdiction may be raised at any time. As was said by Mr. Justice Brewer in the case of *Minnesota v. Hitchcock*, 185 U. S. 373 (which, however, was one of original jurisdiction in this court), respecting the question of jurisdiction:

"A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desired that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter. * * *"

This action is brought against the governer and attorney general of the state. The state is not *eo nomine* a party, but any relief granted in this action to appellant would directly affect the power and interests of the state as effectively as if the state were named as a party to the decree. The action which it is sought to enjoin the governor and attorney general from instituting in the state courts would be an

action in the name of the state and for the direct and pecuniary benefit of the state. In other words, this is not an action merely against state officials to enjoin them from taking some action under a state regulatory act or statute enacted for the benefit of the public, in which cases it has been held that the action is not one against the state, but the action is one directly affecting the rights and interests of the state although the state is not named as an actual party, and in such cases the action has been held to be in effect an action against the state and prohibited by the Eleventh Amendment.

In the case of *In re Ayers*, 123 U. S. 443, this court held that a Federal court had no jurisdiction to enjoin the governor and attorney general of the state of Virginia from instituting an action to collect delinquent taxes. The court, on page 497, says:

"The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. * * *"

And again on page 505, the court says:

"* * * The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial

tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

Appellant is a corporation organized under the laws of the state of Washington and therefore may be deemed a citizen of the state, but the right of the state to be immune from suit in the Federal court does not apply merely to citizens of another state or citizens or subjects of a foreign state. *Fitts v. McGhee,* 172 U. S. 516. In that case this court held that the United States circuit court had no jurisdiction of the suit against the state of Alabama and its governor and attorney general to enjoin the state from enforcing an act of the legislature fixing tolls on a bridge owned by a railroad company and in the

hands of receivers who were complainants in the case. On page 529, the court says:

"* * * As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state. In the case supposed, they would be compelled to make good the state's claim to the property, and could not shield themselves against suit because of their official character. * * * If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private

persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnacy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination."

See also, to the same effect:

Hagood v. Southern, 117 U. S. 52;
North Carolina v. Temple, 134 U. S. 22;
Minnesota v. Hitchcock, 185 U. S. 373;
Farmers National Bank of Hudson v. Jones, 105 Fed. 459;
Central of Georgia Ry. Co. v. McLendon, 157 Fed. 961;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 91;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94;
Robertson v. H. Weston Lumber Co., (Miss.) 87 So. 120;
State ex rel. Gordon v. State Board of Control, (W. Va.) 102 SE 688;
Red Star Line v. Baughman, (Md.) 139 Atl. 291.

MERITS.

Should the court determine that the district court had jurisdiction in this case, adversely to the contention of the appellees, appellant assumes that this court will then pass upon all the questions raised by the complaint, that is, whether or not rights

guaranteed by the Federal Constitution will be violated by the institution of escheat proceedings against it in the state court. It is our belief that this court in this hearing will determine only the question of whether the district court has jurisdiction of the case and if it determines that the district court did have jurisdiction to grant the relief prayed for by plaintiff that the action would be remanded to the district court for further proceedings. Appellant on pages 26 and 27 of its brief cites certain cases for the purpose of showing that the practice of this court would bring before it for consideration every issue that could have been considered by the district court. However, we do not think the cases cited establish that practice. For example, appellant quotes the following statement from the case of *Twist v. Prairie Oil and Gas Co.*, 274 U. S. 684: "The objection that the bill does not make a case within the equity jurisdiction of the Federal court goes not to the power of the court as a Federal court but to the merits," and also the following from the case of *Flanders v. Coleman*, 250 U. S. 223: "The opinion of the district court shows that it ~~only~~ considered the merits of the case in reaching the conclusion that it was without jurisdiction." Undoubtedly, in many cases, in considering the question as to whether or not the court has jurisdiction, the court in effect passes upon the merits, but certainly in the case at bar the district court did not in any sense consider or pass upon any of the constitutional questions

raised by the complaint, but determined only that from the nature of the action plaintiff had a plain, adequate and complete remedy at law and consequently entered its decree of dismissal. However, appellees have no objection whatever to the court considering all the issues of this case as raised by the complaint and the motion to dismiss, provided it is in accordance with the practice and desires of the court, even though all the issues were not considered or passed upon by the district court.

We therefore proceed to answer the contentions of appellant, as set forth in its brief, on the issues other than that relating to the question of jurisdiction. In doing this, we will assume that the case should be decided on the merits on the assumption that the only justification for any action to escheat the property of appellant is by virtue of the Washington constitutional inhibition against ownership of lands by aliens and not under chapter 50, Laws of 1921, because of the two decisions of the supreme court of Washington, heretofore cited, to the effect that chapter 50, Laws of 1921, has no application to conveyances or rights acquired prior to June 8, 1921, the effective date of the act. Considered on this basis, if there is any difference in the application of the law, it would be more favorable to appellant for the reason that the constitutional provision prohibits alien ownership of lands without defining what shall constitute such ownership, whereas chapter 50, Laws of 1921, defines ownership, or to "own,"

to mean "to have the legal or equitable title to or the right to any benefit of" the lands. As appellant's only interest or ownership of land is by virtue of certain right of way easements for a power line, it would follow that there would be less grounds for the contention that its title or interest is "ownership" within the language of the constitution than there would be for the same contention under the definition of ownership contained in the statute. Section 33 of article II of the state constitution provides as follows:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

On this phase the court is called upon to determine (1) whether or not escheat proceedings under that constitutional provision would violate the Commerce Clause, the Contract Clause, the Due Process and Equal Protection Clauses of the Federal Constitution, or treaty rights under the Commerce and

Navigation Treaty of 1815, as extended and continued by the Treaty of 1827, between Great Britain and the United States, and (2) whether the interest, ownership and rights of appellant in the property in question is ownership of land such as is prohibited by the constitutional provision.

Federal Questions.

We will consider first the Federal constitutional questions.

Due Process and Equal Protection.

The general rule with respect to ownership of real property by aliens is stated in 1 Ruling Case Law, page 806, as follows:

"It is a general rule of the common law that the title to real property must be acquired and pass according to the *lex rei sitae*, and the rule applies not only to alienations and acquisitions made by the acts of the parties, but also to the estate and rights acquired by operation of law, the principle originally applicable as between countries entirely foreign to each other prevailing among the states of the American Union. From such a rule the doctrine results that, subject to treaty regulations, the title of aliens to lands within the limits of the several states is a matter of state regulation, and the right of foreigners to hold title to real estate is dependent upon the laws of the state in which the land is situate. A state may exclude aliens from acquiring property within its boundaries as its safety or policy may direct. This rule applies not only to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. In pursuance of this power, and in the absence of treaty regulation, a state may impose a succession tax on

all legacies or devises of property, within its domain, to an alien."

The right of the state to prohibit aliens from owning or acquiring lands, or any interest therein within its borders, is fully established by the decisions of many courts. All the decisions are unanimous in holding that such power exists in the state. The supreme court of Washington has sustained this right on the part of the state and under the constitutional provision quoted above. In the case of *State ex rel. Winston v. Morrison,* 18 Wash. 664, the court sustained an escheat, under section 33, article II of the State Constitution, *supra,* of a 99-year lease held by an alien; and in the case of *State ex rel. Winston v. Hudson Land Co.,* 19 Wash. 85, the court upheld an escheat of a 49-year lease held by a corporation, a majority of the capital stock of which was owned by aliens. Both of these cases were decided under the constitutional provision, and prior to the enactment of chapter 50, Laws of 1921.

In the case of *State v. O'Connell,* 121 Wash. 542, the supreme court of Washington sustained an escheat proceeding under chapter 50 of the Laws of 1921. On page 546, the court says:

"It has become the settled law of this country, that, in the absence of a treaty to the contrary, a state may lawfully prohibit aliens from owning or acquiring any lands, or any interest therein, within its borders."—citing

Orr v. Hodgson, 4 Wheat. (U. S.) 452;
Hauenstein v. Lynham, 100 U. S. 483;

U. S. v. Repentigny, 72 U. S. 211;
De Vaughn v. Hutchinson, 165 U. S. 566;
Blythe v. Hinkley, 180 U. S. 333;
Clarke v. Clarke, 178 U. S. 186;
Jones v. Jones, 234 U. S. 615;
Sullivan v. Kidd, 254 U. S. 433;
Terrace v. Thompson, 274 Fed. 841.

The case of *Terrace v. Thompson*, 263 U. S. 197, was instituted in the Federal district court of Washington to enjoin the attorney general from instituting escheat proceedings and from enforcing the provisions of chapter 50, Laws of 1921. The case was heard before three judges under section 266 of U. S. Judicial Code, and a decree was entered dismissing the action (274 Fed. 841) from which an appeal was taken by plaintiffs to this court. In this case the contention was made by appellants that the state statute was repugnant to the Due Process Clause and the Equal Protection Clause of the 14th Amendment. On page 216, the court says:

"The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the state, protects the owners in their right to lease or dispose of their lands for lawful purposes and an alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the state those powers of police that were reserved at the time of the adoption of the constitution. * * * And in the exercise of such powers, the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people. And, while Congress has exclusive jurisdiction

over immigration, naturalization and the disposal of the public domain, each state, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders."

In that case the court determined that the state statute applying alike to all aliens, withholding from them the right to own land, could not be deemed capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the Due Process Clause. It further determined that the classification of aliens into those who had declared their intention to become citizens, and permitting such to own land, and prohibiting non-declarants from ownership, did not violate the Equal Protection Clause of the constitution, and said that "the Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease," and that "the state act is not repugnant to the Equal Protection Clause, and does not contravene the Fourteenth Amendment."

See also:

Porterfield v. Webb, 263 U. S. 225;
Webb v. O'Brien, 263 U. S. 313;
Frick v. Webb, 263 U. S. 326.

sustaining the constitutionality of the California alien land law. The latter case held that the California alien land law did not conflict with the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, and sustained a provision in that law prohibiting aliens from acquiring shares of stock

in any corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural lands. The decision points out that it is within the power of the state to forbid indirect, as well as direct, ownership or control of agricultural land by aliens. If a state is empowered to prohibit an alien from acquiring a single share of stock in a corporation that has power to acquire and own agricultural lands, certainly it has power to prohibit a corporation from owning lands when a majority of its shares are owned by an alien.

Contract Clause.

It seems to us that the ruling in these cases leaves nothing to be said in favor of the claim that the Washington constitutional provision violates any Federal Constitutional provision. In other words, if the prohibition of alien ownership of lands does not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment how can it be asserted with any show of logic or reason, that such a prohibition violates the Commerce Clause or the Contract Clause of the Federal Constitution. We are unable to see how any greater restriction is placed upon the state by the Commerce Clause or the Contract Clause than by the Due Process and Equal Protection Clauses. If the Due Process and Equal Protection Clauses are not violated by the prohibition against alien ownership of lands, certainly the Commerce Clause and Contract Clause are not violated by the same prohibition. It is on this theory that we

have urged on the question of jurisdiction that no serious Federal question is involved in this appeal and that the appeal should be dismissed upon that ground for that reason, if for no other.

Furthermore, as to the Contract Clause, we have already advanced the argument that in any event that clause cannot be called in question in this case in view of the holding of the Supreme Court in the two cases (*State v. Natsuhara,* 136 Wash. 437, and *State v. Motomatsu,* 139 Wash. 639) heretofore referred to, that the anti-alien ownership statute (ch. 50, L. of 1921) would not apply to conveyances or rights acquired prior to its enactment, and that, therefore, the allegations of the complaint that the governor and attorney general have threatened to proceed under that statute should be disregarded. If the case is considered as one arising solely under the provisions of the Washington constitution with respect to alien ownership of lands, the Contract Clause could not, in any event, be brought into issue because the easements in the real estate in question were acquired by appellants in the year 1917, whereas, the state constitutional provision in question is a part of the constitution adopted, and which became effective November 11, 1889, upon the proclamation of the President of the United States, admitting Washington state into the Union. *Moore v. Perrott,* 2 Wash. 1.

We scarcely need cite any authority for the rule that the Contract Clause of the Federal Constitution

applies only to legislation subsequent in time to the contract alleged to have been impaired.

Munday v. Wisconsin Trust Co., 252 U. S. 499.

Therefore, if the case is considered on the basis of the constitution alone, which is, in fact, the only basis upon which a decision could be rendered conformable to the facts, the rights of appellants were all acquired long subsequent to the adoption of the constitutional provision in question, and therefore there could in no event be any question arise under the Contract Clause.

If, however, the complaint, charging that the state officials have threatened to proceed with escheat proceedings under the provisions of the state constitution (Art. II, sec. 33) and the statute (ch. 50, L. '21) to which a motion to dismiss was directed, requires this court to decide the case upon the assumption that the escheat proceedings alleged to have been threatened would have been taken under chapter 50, Laws of 1921, we will consider for a moment the effect of the Contract Clause with respect to that act, and on the assumption that appellant's conveyances, having been made prior to the adoption of the act, are threatened with escheat under the terms and authority of the act. As we have seen, the right of the state to prohibit ownership of land by aliens is by virtue of the exercise of the police power reserved to the state. When the police power is validly exercised, all Federal constitutional restrictions on the state's power must yield, even the Contract

Clause. The cases most common on this feature are those having to do with the contracts made by public utility corporations with their customers which were abrogated by the state in the exercise of its power to fix rates for public utilities. Such a case is *Union Dry Goods Co. v. Georgia Public Service Corporation,* 248 U. S. 372. On page 375, the court says:

"That private contract rights must yield to the public welfare where the latter is appropriately declared and defined, and the two conflict, has been often decided by this court."

and, on page 376, the court quotes the following from *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U. S. 548:

"It is settled that neither the 'Contract' clause nor the 'Due Process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

See also:

Raymond Lumber Company v. Raymond Light & Water Co., 92 Wash. 330;

State ex rel. Pratt v. Seattle, 73 Wash. 396.

This rule has been applied not only to sustain the abrogation of contracts with public utility companies for service, but also has been applied to contracts of an entirely different nature. For example, in the case of *Mangault v. Springs,* 199 U. S. 473, a contract between two individuals by which one agreed to re-

move a dam from a river and to thereafter permit the waters to flow uninterruptedly, was completely nullified by an act of the legislature authorizing the reconstruction and maintenance of the dam by one of the parties to the contract. This court sustained the act of the legislature. On page 480, the court says:

"It is the settled law of this country that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

Also in the case of *Marcus Brown Co. v. Feldman*, 256 U. S. 170, the court sustained a New York statute regulating tenancies of property, providing that only reasonable rental should be exacted, and, in effect, permitting the tenant to remain in possession as long as willing to pay a reasonable rental. From the case it appears that the tenant had made the lease prior to the enactment of the statute, in which he contracted to pay a certain rental, and agreed upon the expiration of the lease to vacate and surrender the premises. The tenant refused to vacate upon the expiration of the lease, and the owner brought ouster proceedings. The court sustained the validity of the statute, even though its effect was to completely nullify the lease made by the tenant with the owner before the statute was enacted. On page 198, the court says:

"In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone in effect upon October 1, last year. But contracts are made subject to this exercise of the power of the state when otherwise justified, as we have held this to be."

The *Marcus Brown* case was again considered, and the rule applied in the later case of *Levy Leasing Co. v. Siegel,* 258 U. S. 242.

Thus, it is seen that even contracts must fall before the proper exercise of the police power; and, as we have heretofore pointed out, it has been held by this court in the case of *Terrace v. Thompson,* 263 U. S. 197, that the enactment of chapter 50 of the Laws of 1921, was a valid exercise of the police power of the state.

Under the heading of "Contract Impaired, Equal Protection and Due Process of Law Denied," beginning on page 37, appellant, in its brief, discusses the contract feature in such a manner that we do not quite understand its application to the present case. For example, appellant states that the closing sentence of section 33 of article II of the state constitution, reading that

"Every corporation, a majority of the capital stock of which is owned by aliens shall be considered an alien for the purpose of this prohibition,"

violates the Contract Clause of the Federal Constitution, as well as other constitutional provisions. We see no grounds whatever for that claim. Appellant follows this, on pages 38 to 49 of its brief, with the

argument and citations of numerous authorities, beginning with *Providence Bank v. Billings*, 4 Peters 514; and *Dartmouth College v. Woodward*, 4 Wheat. 518, to the effect that a private corporation is an individual entity wholly separate and apart, in a legal sense from and in nowise affected by changes in the ownership of its capital stock, and that the charter of a private corporation is a contract within the meaning of the Contract Clause of the Federal Constitution. We confess our inability to understand the application of the cases or argument to the case at bar. It certainly needs no citations of authority to establish the rule that a private corporation is an individual entity, wholly separate and apart, and in no manner affected by changes in the ownership of its capital stock, but the argument is further advanced on page 39 of the brief that under the closing sentence of section 33, article II of the State Constitution, a non-consenting and helpless minority stockholder of a Washington corporation might be deprived of his property, irreparably injured and left entirely without redress by transfer to aliens of a majority of the capital stock. We do not see how appellant can complain of this feature of the constitutional provision. Appellant was not organized as a corporation under the laws of the state of Washington until the year 1917, at which time the constitutional provision was in full force and effect. It is fundamental that a corporation organized under any statute must necessarily be organized and obtain

its charter subject to any provisions of the constitution that are applicable. Furthermore, the supreme court of the state of Washington answered this argument of appellant in the case of *State ex rel. Winston v. Hudson Land Co.*, 19 Wash. 85. This case was an escheat proceeding instituted against a corporation under the state constitutional provision. It appeared in that case that at the time the property was conveyed to the corporation, a majority of the capital stock of the corporation was actually owned by citizens, and that afterwards the ownership of a majority of the stock passed to aliens. Considering this feature of the case, and applying the last sentence of the constitutional provision, against which appellant is directing its argument in the part of its brief to which we are now referring, the court, on page 87, said:

"We cannot understand what meaning could be attached to this last provision of the act, if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of lands. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corporation, it would work an injury and a hardship upon the corporation and upon the owners of stock thereof to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could, and surely would, have been used. We do not think that language more explicit could have been used. Presumably the members of the constitutional convention regarded this question as of great importance, and the article

doubtless was passed after careful consideration and revision; and the whole article shows that it was the intention of the law that the ownership of lands by aliens should be prohibited, and that it should be prohibited despite of subterfuges which might be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the constitution in clothing this article in language which is so plain that it is not susceptible of judicial construction. First, attempts have been made, in the case just above referred to, by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the constitution is again sought to be avoided and benefits obtained under it by indirection which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they cannot, our laws confer certain benefits on, and exemptions to, corporations which are valuable, and if men see fit to enter into corporations for the purpose of doing business instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But even if it be conceded that these hardships would have to be endured, the evident spirit of the constitution must be sustained."

As above stated, we do not dispute the principle first announced in the *Dartmouth College* case, that the charter of a corporation is a contract which may

not be impaired without violating the Contract Clause of the Federal Constitution, but, as every lawyer knows, following the decision in that case, it became the practice of the states to insert either in its corporation law or constitution, a reservation of the power to alter or amend such charter. Such a provision is contained in section 1 of article XII of the Washington state constitution, and reads as follows:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law."

Of course, this constitutional provision became a part of any charter or license granted appellant as a corporation in this state, and the power of the state to alter or amend the laws under which corporations were organized or to restrict the business of a corporation has been decided in many cases in the supreme court of Washington, of which the following are illustrative:

Union Trust Co. v. Moore, 104 Wash. 150;
Duke v. Force, 120 Wash. [redacted]

This power has likewise been sustained by many decisions of this court, some of which are cited in the case of *Duke v. Force, supra.*

As we have stated, it is not clear to us how the cases cited by appellant on this point have any bear-

ing on the case, and it is not clear to us what application is intended to be given to them in this case. Certainly, the right of the state to enact chapter 50, Laws of 1921, is not curtailed by the fact that appellant may have been organized under the general corporation laws of this state enacted prior to the adoption of that statute; and certainly, if the case is considered only with respect to the constitutional prohibition against alien ownership of lands, appellant's charter or license, granted subsequent thereto, must be subject to that constitutional provision. The argument is made by appellant (p. 42 of its brief) that because it is authorized by its charter to "buy, sell, own and operate power plants, transmission lines and power stations, also to buy, sell and mortgage real estate in connection with its business of selling and distributing electric current for lighting and power purposes," that its charter with these provisions becomes a contract within the meaning of the Contract Clause of the constitution. This may be conceded, but certainly the charter, or the provisions of the articles of incorporation cannot transcend the constitutional inhibition against ownership of lands by a corporation, of which a majority of its capital stock is owned by aliens. It is a well-established principle that a corporation may not, by the enumeration of its powers in its articles of incorporation, secure rights or powers not otherwise authorized by the constitution or laws of the state in which it is organized.

Spokane v. Amsterdamsch, 22 Wash. 172; *Parsons v. Tacoma Smelting Co.*, 25 Wash. 492.

At this point we may briefly note appellant's argument (pp. 38 and 40 of its brief) that section 33, article II of the state constitution, prohibiting alien ownership of lands, is in conflict with section 12 of article I of the same constitution, providing that "no law shall be passed granting to any citizen, class of citizens or corporation, other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations," and that therefore, the former provision must yield to the latter. We see no conflict between these two provisions. Although in the argument, section 12 of article I is referred to as the more dominant provision, we see no reason why one provision should dominate the other, so long as both may be equally effective. Apparently, under appellant's theory all corporations should be entitled to exercise exactly the same privileges; that a banking corporation should be entitled to exercise the powers of a railroad corporation, or a real estate corporation the powers of a banking corporation. This is surely not the law. The legislature undoubtedly has power to classify corporations and restrict the powers to different classes.

On pages 40 and 41 of its brief, appellant refers to, and quotes from the decision of the supreme court of the state of Washington in the case of *Hastings v. Anacortes Packing Co.*, 29 Wash. 224, and in this

connection refers to section 3852, Rem. Comp. Stat., a copy of which is set out in full as appendix 2 to appellant's brief. Again, we do not follow appellant in its argument that this case or the statute referred to have any particular bearing on the question before the court. In the case referred to, the supreme court of this state held that a corporation organized under the laws of the state of Washington, although a majority of its capital stock might be owned by aliens, would not be considered an alien for all purposes, and incapable of acquiring fishing licenses or fishing locations in the waters of the state. Section 33 of article II of the state constitution is referred to as declaring an alien within the provisions of that section to be any corporation of which the majority of its capital stock is owned by aliens, and it was there decided that any such corporation shall not be considered an alien for all purposes, or for any other purpose than ownership of lands. Furthermore, section 3852 of Rem. Comp. Stat., relates solely to the powers of foreign corporations, and authorizes such corporations, when organized for purposes for which domestic corporations may be formed, to acquire, purchase, hold, sell, convey or otherwise dispose of real estate or personal property necessary or convenient to carry into effect the objects and purposes of its incorporation. The section also contains the following express proviso:

"And provided further, that no corporation, the majority of the capital stock of which is owned by

aliens other than those who in good faith have declared their intention to become citizens of the United States, shall acquire the ownership of any lands in this state other than lands containing valuable deposits of minerals, metals, iron, coal or fireclay, and the necessary land for mills and machinery to be used in the development thereof, and the manufacture of the products therefrom, except where acquired under mortgage, or in good faith in the ordinary course of justice in the collection of debts."

Appellant is a domestic corporation and the state makes no contention that because a majority of its capital stock is owned by an alien that it is an alien, except as to the ownership of lands, and so, again, we do not understand how this decision of the supreme court of Washington or the section of the statute referred to, can be applied to afford appellant any protection against the constitutional provision prohibiting the ownership of lands by a corporation of which the majority of its capital stock is owned by aliens.

Furthermore, in the case of *State ex rel. Morrell v. Superior Court,* 33 Wash. 542, the supreme court of Washington held that a foreign corporation (the Northport Smelting and Refining Company) had no power to condemn lands for a right of way to conduct water to its smelter, because, being an alien, it could not under the constitutional inhibition against alien ownership of lands, acquire, own and hold such property rights. In that case the corporation contended that under the provisions of section 7214, Pierce's Code, section 4291, Bal. Code, a foreign corporation

was authorized to do any and every act which a domestic corporation might do if organized for the same purpose. The sections of Pierce's Code and Bal. Code there referred to are identical with section 3852 of Rem. Comp. Stat., referred to by appellant in the case now before the court. In answering the contention of the corporation made in the *Morrell* case, the court, on page 550, says:

"It is said, however, by respondent, that under the provisions of Sec. 7214, Pierce Code, Sec. 4291, Bal. Code, any corporation incorporated under the laws of any state or territory in the United States, or in any foreign state or country, for any purpose for which a domestic corporation is authorized to be formed under the laws of this state, shall have power to do any and every act which a domestic corporation may do, on complying with the conditions prescribed under the statute, which conditions were complied with in the case at bar. But it certainly will not be contended that any statute could remove the constitutional inhibition providing that the ownership of lands by aliens is prohibited in this state and especially providing that every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition. So that a statutory argument is entirely without force."

This seems to definitely answer the contention of appellant, so far as we are able to understand it, with respect to any application that section 3852 of Rem. Comp. Stat. may have.

Commerce Clause.

Appellant's principal reliance seems to be that the state constitutional provision violates the Com-

merce Clause of the Federal Constitution, due to the fact that appellant is engaged in transmitting electrical current by means of a power line constructed on the easements for right of way which are involved in the action, from a point in Canada across the Canadian border to various points within the state of Washington. We will concede, under the authority of the case of *Public Utilities Com. v. Attelboro Steam & Electric Co.*, 273 U. S. 83, that the transmission of electric current between a point in Canada and a point in the United States would be foreign commerce, and as such, entitled to any protection that the Commerce Clause is able to afford. We do not, however, concede that the prohibition of ownership of real estate directly affects foreign commerce. The facts presented by this case are entirely different from the facts presented by cases where the state has attempted to place some burden on interstate or foreign commerce. The only thing the state has done in this instance is to prohibit alien ownership of land, and if such a prohibition affects foreign commerce, it is only indirectly.

In the case of *Munday v. Wisconsin Trust Co.*, 252 U. S. 499, the court considered a Wisconsin statute which prohibited foreign corporations from transacting business, or acquiring, holding or disposing of property without having complied with certain statutory requirements with respect to registration, and providing that every contract made by such foreign corporation relating to property within

the state before having complied with the statutory requirements should be wholly void. The corporation in question in that case was a Maine corporation, and in the state of Illinois secured deeds to certain real property in the state of Wisconsin. In an action in the state court the deeds were held void because of failure of the corporation to comply with the Wisconsin statute relating to foreign corporations. The claim was made in behalf of the corporation that the statute as applied violated the Contract Clause, the Due Process Clause and the Equal Protection Clause of the Federal Constitution. Apparently, also, the corporation claimed that the Commerce Clause of the Constitution was violated. This court held, however, that the Contract Clause was not involved as the statute in question had been enacted prior to the transaction in question, and also that the Due Process Clause was not violated, and on page 503 said:

"Where interstate commerce is not directly affected, the state may forbid foreign corporations from doing business or acquiring property within her borders, except upon such terms as those prescribed by the Wisconsin statute. * * * No interstate commerce was directly involved in the transaction here questioned. Moreover, this court long ago declared: 'The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate',"—citing

U. S. v. Crosby, 7 Cranch 115.

A similar rule was applied to a foreign corporation with respect to doing business and owning real estate in *Fritts v. Palmer,* 132 U. S. 282. Again, in

the case of *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, it appeared that a foreign corporation had failed to qualify to do business in the state of Wisconsin, as required by law. It entered into a contract with a Wisconsin corporation which involved the erection of a glue factory in Wisconsin, and the management of the production of the factory by the foreign corporation. It was contemplated by the contract that shipments of glue would be made to points outside the state of Wisconsin. The court refused to give any efficacy to the contract. Similar cases are *Mugler v. Kansas*, 123 U. S. 623, and *Kidd v. Pearson*, 128 U. S. [redacted], which involved the power of the state to prohibit the manufacture and sale of intoxicating liquor, even though the manufacture was for the purpose of shipment outside the state. In these cases the court held that interstate commerce was not directly affected.

We, therefore, assert that the action of the state in prohibiting ownership of land by aliens is not a direct interference with foreign commerce, which is prohibited by the Federal Constitution and such as was held prohibited in the case of *Public Utilities Commission v. Attelboro Steam & Electric Co.*, 273 U. S. 83, where the public service commission of Rhode Island attempted to fix the rate to be charged by a corporation for bringing in from a point outside the state electrical current and selling it to another company for distribution in the state of Rhode Island.

Furthermore, under the police power, which is the power by virtue of which the state prohibits alien ownership of lands, the state may even directly interfere with interstate commerce. Under this power the state may, even though directly affecting interstate commerce, regulate and control the manner of running and operating interstate railroad trains:

Gulf, C. & S. F. R. Co. v. Texas, 246 U. S. 58;
Herrington v. Georgia, 163 U. S. 299;
N. Y. Ry. Co. v. N. Y., 165 U. S. 628;
Gladsen v. Minnesota, 166 U. S. 427;
L. S. Ry. Co. v. Ohio, 173 U. S. 285;
St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518,

may provide for inspection of commodities moving in interstate commerce,

Turner v. Maryland, 107 U. S. 38,

may enforce quarantine provisions on interstate shipments,

O. W. R. & N. v. Washington, 270 U. S. 87,

may prohibit the shipment in interstate commerce of green or unripe citrus fruit,

Sligh v. Kirkwood, 237 U. S. 52,

may prohibit exportation of wild game,

Geer v. Conn., 161 U. S. 519,

may prohibit importation of game from foreign countries,

New York ex rel. Silz v. Hesterberg, 211 U. S. 31,

may tax instrumentalities used in interstate commerce,

Henderson Bridge Co. v. Kentucky, 166 U. S. 150;

Postal Telegraph Cable Co. v. Adams, 155 U. S. 688,

and may prohibit the manufacture of intoxicating liquor although intended for transportation in interstate commerce,

Kidd v. Pearson, 128 U. S. 26.

In all of these cases, the action of the state was a direct interference with, or burden upon interstate commerce, or the commodities or instrumentalities shipped or used therein, but in all of them the power of the state was upheld as a valid exercise of the police power, and against which the Commerce Clause of the Constitution was held to be inoperative.

If a state may, without violating the Due Process and Equal Protection Clauses, deprive an alien of his property right to engage in a useful and customary occupation, a right guaranteed him by those clauses (*Truax v. Raich,* 239 U. S. 33), by prohibiting him from owning, leasing, or operating farm lands, as was held in *Terrace v. Thompson,* 263 U. S. 197, why may the state not by the same means, deprive him of his right to engage in interstate commerce? The alien's right under the Commerce Clause is no more sacred than his right under the Due Process and Equal Protection Clauses.

If the right of an alien to own land is subject to

the Commerce Clause, then the law of California, Washington, and any other state prohibiting alien ownership of lands, is a dead letter. If the Commerce Clause is to operate as a restriction on the power of the states in this respect, then an alien may possess himself of land and raise or produce something thereon capable of transportation across a state line and enjoy complete freedom from alien ownership restrictions.

We have cited cases from this court showing the power of the state to prohibit foreign corporations from owning land until compliance with state registration and license laws, and in some of them the power of the state was upheld to restrict persons and corporations from engaging in business even though it appeared that their intention was to engage in manufacture within the state and ship to points outside the state. We admit, however, that it was said in such cases that there was no direct interference with interstate commerce, and admit that there was an intimation in the cases that if it were deemed a direct interference with interstate commerce the power would probably be denied the state. However, we do not now contend, nor do we think it is necessary to contend in this case, that a state would have power to prohibit a corporation organized under the laws of another state of the Union, or an individual resident of another state, engaged in an interstate business,

from owning real estate within the state necessarily used in carrying on interstate business. But, we do contend that a state is empowered, under its police power, to say to an alien citizen, or to an alien corporation, that you may not own real estate, even though you desire to use the real estate in connection with interstate or foreign commerce. If alien individuals or alien corporations are to secure the right to own real estate, whether for use in interstate or foreign commerce, or otherwise, they must secure such rights by means of a treaty between the United States and the country of which they are subjects. This must be so from the necessities of the case. No nation can become great, or prosper, or retain its prestige or power, nor can it successfully wage war when necessity therefore arises, with its lands in alien ownership. All wealth arises from, and is dependent upon, either directly or indirectly, the soil. No greater necessity can be imagined for the right to exercise the police power of the state than arises in connection with the right to alien ownership of lands. As was said by Judge Cushman, speaking for the statutory three-judge court in the case of *Terrace v. Thompson*, 274 Fed. 841, the decision in which was affirmed in *Terrace v. Thompson*, 263 U. S. 197:

"If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow and the structure erected thereon but a

tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

Referring again to the case of *Terrace v. Thompson*, 263 U. S. 197, not only do we believe that case settles all questions raised in this case because it specifically decided that the Due Process and Equal Protection Clauses were not violated by the statute prohibiting alien ownership of land, and that as a necessary corollary no other Federal constitutional provisions were violated by such statute, but also, we think that case settled the question as to violation of the Commerce Clause of the Constitution for another reason. It appears from that case on page 222 that for the purpose of bringing *Nakatsuka* (the alien involved) within the provisions of the treaty, the amended complaint alleged that in addition to being a capable farmer, he was engaged in the business of trading, wholesale and retail, in farm products and shipping the same in intrastate, *interstate* and *foreign* commerce. The preamble to the treaty involved declared it to be a "treaty of commerce and navigation." Article I granted the respective citizens of Japan and United States the liberty to enter, travel and reside in the territories of the other country, and to carry on trade, to lease land for commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects. It is very apparent from the language of the treaty that the Japanese subject was au-

thorized to carry on not only intrastate commerce, but also interstate and foreign commerce. If, as the court in its decision determined, the right given the Japanese to engage in interstate and foreign commerce was not violated by the state statute prohibiting alien ownership of land, certainly the same statute would not violate any right given appellant by the Federal Constitution to engage in interstate or foreign commerce.

Many cases are cited by appellant in its brief, pages 50 to 61, including the early case of *Gibbons v. Ogden*, 9 Wheat. 1, to show the restrictions and limitations placed upon the state by virtue of the Commerce Clause. It would serve no useful purpose, and would unduly extend this brief, to show the distinction between the facts in each of those cases and the facts of the case now before the court. We find nothing in them that conflicts with the position we take in this case. In most of them it appears that the state had attempted to tax shipments of commodities moving in interstate commerce, to prohibit the movement of certain commodities in interstate commerce, or to place a tax upon, or require a license for, the privilege of engaging in interstate commerce. These instances were all direct interference with and burdens upon interstate commerce. None of them involve any question at all pertinent to the issues before the court in this case.

Before leaving this phase of the case, we again reiterate that the action of the state in prohibiting

alien ownership of lands is in no sense intended to be, nor is it, in fact, a direct burden upon or interference with interstate commerce, and we again submit that this court, having determined in *Terrace v. Thompson*, 263 U. S. 197, and the cases involving the California alien land law, that the prohibition against ownership of land by aliens is a valid exercise of the police power of the state and does not violate the Equal Protection or Due Process Clauses of the Federal Constitution, it must follow logically from the holdings of those cases that such a prohibition against alien ownership does not violate the Commerce Clause of the Federal Constitution.

Treaty Rights.

It is alleged in the complaint that chapter 50, Laws of 1921, and section 33 of article II of the state constitution are in contravention of and repugnant to certain clauses of the Federal constitution, heretofore considered, and also to the provisions of the Treaty of 1815 between the United States and Great Britain, as extended by the Treaty of 1827. We have heretofore quoted article I of the treaty and will annex to the brief as appendix I the full text of the treaty and the extension thereof. We cannot believe that it is seriously contended that any rights or protection are afforded to appellant by virtue of this treaty. Appellant is a domestic corporation organized under the laws of the state of Washington. It is true that the state constitutional provision in question here

does, after prohibiting ownership of lands by aliens, declare that "every corporation, a majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition." This provision becomes applicable to appellant because it appears from the allegations in the complaint that the West Kootenay Power & Light Company, Ltd., of Canada, an alien corporation, is the owner of a majority of the issued capital stock of appellant. It may well be doubted under such circumstances whether appellant is in any event an alien within the meaning of any treaty negotiated between the United States and any foreign country, and especially an alien of any particular country. The Constitution does not declare that such a corporation shall be considered an alien of Great Britain. We assume that the only reason that appellant feels that it is entitled to some protection under the particular treaty is because a majority of its capital stock is owned by the West Kootenay Power & Light Co., Ltd., of Canada, but, as to that, there is no allegation in the complaint that this corporation is a Canadian corporation, the allegation merely being that it is "an alien corporation." Furthermore, it is difficult to see how the treaty in any event affords any protection or rights to a corporation organized under the laws of the countries negotiating the treaty, or how it affords any protection or any right to a citizen of one of the contracting parties to own stock in a corporation organized under the laws of the other contracting party.

It would seem that, if it was intended to grant the right to citizens or corporations of one of the countries to own stock in a corporation organized under the laws of the other country, some provision to that effect would necessarily have been inserted in the treaty, but we find nothing of this character in the treaty.

The statement or declaration in the constitutional provision is no more, in effect, than a declaration that no corporation organized under the laws of this state shall own real estate if a majority of its capital stock is owned by an alien. Certainly it would be competent for the state, with the powers to grant or withhold to persons the right to organize corporations under its laws, to require as a condition of the granting of such power that the corporation should not be empowered to hold real estate if a majority of its capital stock were owned by an alien. On this theory, appellant would not in any sense be an alien under any treaty. It could hardly be contended that in negotiating a treaty Great Britain had in mind the protection of a corporation organized under the laws of one of the states of the Union, a majority of the capital stock of which might by act of individuals become owned by one of its subjects. It would seem that, if such were the intent of the treaty, it should contain express provisions authorizing the subjects of the respective countries to acquire, own and hold stock in corporations of the respective countries.

However, aside from this, and for the purpose

of argument, let us assume that appellant is an alien subject of Great Britain and as such entitled to any protection or rights afforded to British subjects by the treaty. The preamble of the treaty recites that the United States and His Brittannic Majesty being desirous to regulate the commerce and navigation between their respective countries, territories and people, and in consequence have concluded certain articles of the treaty. In the first article of the treaty it is recited that there shall be between the territories of the United States of America and all the territories of His Brittannic Majesty in Europe a reciprocal liberty of commerce and that the inhabitants of the two countries, respectively, shall have the liberty freely and securely to come with their shipments and cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, and to enter into the same and remain and reside in any parts of the said territories, respectively; and to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively. Article II contains provision with respect to the duties that may be imposed on importations into the United States of articles of growth, produce or manufacture of His Brittannic Majesty's territories in Europe and the duties that may be imposed

on importation into the territories of His Brittannic Majesty in Europe of any articles of growth, produce or manufacture in the United States, and with respect to duties or charges that may be imposed in any ports of the United States on British vessels, and on articles of the United States in ports of His Brittannic Majesty's territory in Europe. Article II, in the concluding paragraph, provides that "the intercourse between the United States and His Britannic Majesty's possessions in the West Indies, and on the continent of North America, shall not be affected by any of the provisions of this article but each party shall remain in the complete possession of its rights in respect to such an intercourse." It is the insertion of this paragraph which leads appellant to the conclusion that article I of the treaty applies to the Dominion of Canada. We confess that it is not entirely clear to us why the parties to the treaty deemed the insertion of this paragraph necessary, but certainly, whatever its purpose, it would be a startling construction to hold that the language of article I, expressly limiting the rights therein conferred to the territories of His Brittannic Majesty in Europe, were modified to the extent of making the treaty applicable to the territories of His Brittannic Majesty not only in Europe but in the West Indies and the continent of North America as well. Furthermore, it is our belief that this treaty is intended only to apply to commerce and navigation on water. It would seem that this is all the contracting parties could have had

in mind in view of the fact that the territories of the respective countries affected by the treaty are separated by water. It recites that the inhabitants of the two countries shall have liberty to come with their ships and cargoes to such places, ports and rivers, to which other foreigners are permitted to come, and remain and reside in any parts of said territory and to hire and occupy houses and warehouses for the purpose of their commerce and generally as merchants and traders to enjoy the most complete protection and security for their commerce. The business in which appellant is engaged is transmittal of electrical current for power and light purposes. In no sense is it a merchant or trader and in no sense is it engaged in shipping or in commerce in connection with shipping as a merchant or trader; nor does it appear that it occupies any house or warehouse for the purpose of commerce.

NECESSARY LANDS FOR MILL AND MACHINERY USED IN DEVELOPING MINING PROPERTY.

It is noted that section 33 of article II of the state constitution, heretofore quoted, contains the following provision:

"* * * Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. * * *"

On page 37 of appellant's brief it briefly men-

tions this provision and mildly asserts its position to be that the land burdened with transmission lines and substations necessary for delivery of power used in the operation of mills and machinery necessary for the development of mineral lands is in fact necessary land for mills and machinery used in the development of the mines. As stated by appellant, it does not appear that this clause has ever been construed by the supreme court of the state of Washington. However, we cannot believe that an easement and right of way extending for many miles upon which is a transmission power line carrying electrical current to the mine could by any reasonable construction be regarded as land necessary for mills and machinery in the development of the mine. We cannot see how it can be asserted that a transmission line is in any sense a mill or that it is machinery. A mill or machinery used in connection with the development of a mine have definite and clear meanings and uses to all who are familiar with the mining industry. In addition to this, it appears from the complaint that the transmission line of appellant is used not only for conveying power to the mine but also for furnishing light and power to consumers in the town of Northport and other points in Stevens county, Washington. We feel sure that no court would hold that the land used by appellant for its transmission line is land used for mills and machinery in the development of a mine within the meaning of the exception to the constitutional provision.

Property Rights Such as Appellant's Are Within Constitutional Inhibition.

In considering the nature of the property rights of appellant which it is alleged the state has threatened to escheat, and whether the same, by reason of their nature are subject to escheat, we will consider only whether they are of such a nature that the ownership thereof is prohibited by the state constitutional provision rather than by the state statute. The constitution prohibits "ownership of lands by aliens," whereas the statute defines "ownership" to mean, "to have the legal and equitable title to or the right to any benefit of." Therefore, there is not the slightest question but that the property rights of appellant would fall within the prohibition of the statute. In this connection, this court held in *Webb v. O'Brien*, 263 U. S. 313, in considering the California alien land law which prohibited aliens from owning real property or any interest therein except as prescribed by treaty, that a cropping contract which gave the right to one-half the crops grown on real estate in consideration of services and labor in producing the crop, was prohibited by the California statute, even though the cropping contract expressly provided that the "cropper" should have no interest or estate whatever in the land.

We prefer to consider it on the basis of the language of the constitution rather than the statute, because certainly if it is within the constitutional in-

hibition, it would be within the statutory inhibition; and, as we have heretofore noted, it is our desire, if the court can consistently do so, that the case be determined under the constitutional provisions rather than the statute, due to the inability of the state to institute escheat proceedings under the statute.

The various instruments by which appellant acquired its rights are attached to the complaint as Exhibit "1" and are shown in the transcript of record on pages 7 to 48, inclusive. So far as we have been able to determine, there is little, if any, difference in the legal effect of any of these conveyances, although a few of the conveyances provide that the easement will cease if the land is abandoned for the uses for which granted. We here set forth in full the form of the second instrument attached to the complaint:

"RIGHT OF WAY DEED.

"This Indenture made the eighteenth day of October, A. D. 1917, between Rasmus Malde, bachelor, and Harry W. Bodey, bachelor, of the State of Washington, hereinafter called the grantors, of the first part and the Northport Power & Light Company, a corporation organized and existing under and by virtue of the laws of the state of Washington, hereinafter called the Grantee of the second part, Witnesseth:

"In consideration of the sum of two hundred dollars ($200.00) paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain

its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M. in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

"Beginning at a point on the south boundary line of lot 15 in Section 3, Township 40, North, Range 39 E. W. M. to a point 1,130 feet east of the southwest corner of lot nine; thence from last above named point S. 26 degrees and 15 minutes E. as surveyed through, said lot 9 of said section 3 across the southern cross mining lode claim.

"The said strip conveyed being forty-nine and one-half feet on each side of the said center line.

"Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said power line and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

"And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successor and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

"In witness whereof the said Grantors, of the first part, have hereunto set their hands and seals the day and year first above written.

"Rasmus Malde, Harry W. Bodey."

"State of Washington,
"County of Stevens, ss:

"On this 19th day of October, A. D. 1917, before me personally appeared Rasmus Malde, bachelor, and Harry W. Bodey, bachelor to me known to be the

individuals described in, and who executed the within and foregoing instrument, each and severally, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

"John H. Bowers,

"Notary Public for the State of Wash., residing at Northport, Wash. My commission expires March 11th, 1921. (Seal John H. Bowers, Notary Public, State of Washington. Commission expires Mar. 11, 1921.)

"Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:07 o'clock P. M. Recorded Oct. 23, 1917. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy."

This instrument is in the form required by the laws of the state of Washington for the conveyance of real estate, and as such entitled to record under the recording laws of the state relating to conveyances of real estate. In most of the conveyances there is no provision for termination of the grant. The only legal question to be determined is whether the interest and rights of appellant acquired under these conveyances amount to "ownership of land" within the meaning of the constitutional provision.

Inasmuch as this question relates to the title to real estate within the state of Washington, we assume that the decisions of the supreme court of this state will be accepted by this court as controlling, and for that reason, will cite and rely principally upon Washington decisions, although we will also cite and

refer to a few decisions from Federal courts and other state courts which we deem pertinent.

This constitutional provision was first considered by our supreme court in the case of *State ex rel. Winston v. Morrison,* 18 Wash. 664. In this case, the court held that a lease of real property for a term of 99 years was prohibited under the constitutional provision, and on page 665, the court says:

"Respondent contends that it is only *absolute ownership* of certain kinds of realty which is prohibited; that the word 'conveyance' means the transfer of title to another and the instrument by which it is done. The question for determination is, what is the meaning of the section of the constitution under consideration? We have not been referred to a case at all similar to the one we are now considering. We think that the section must be given a reasonable interpretation. If a lease for a term of 99 years can be sustained, then why not one for 999 years? And it would seem to require little argument to demonstrate that if a lease for such a term can lawfully be made to an alien the constitutional prohibition against ownership of lands in this state by aliens becomes meaningless; and parties may indirectly accomplish a result which they are forbidden to do directly."

Again, in the case of *State ex rel. Winston v. Hudson Land Company,* 19 Wash. 85, the supreme court of Washington decided that a 49-year lease to real estate would fall within the ban of the constitutional provision.

These two decisions of the supreme court of Washington have never been reversed or modified, but have been cited and referred to in many subsequent decisions of the court. It should be stated,

however, that in the cases of *State v. Natsuhara*, 136 Wash. 437, and *State v. Motomatsu*, 139 Wash. 639, it was held that a lease of real estate for ten years would not be prohibited by the constitutional provision. Both of these cases were decided on the theory that under the decisions of the court in the *Morrison* and *Hudson Land Company* cases, the court deliberately expressed its view that if a lease was for a reasonable length of time, it would be valid, and that that view having been expressed, and it having been generally understood that such was the law, it should be adhered to under the rule of *stare decisis*.

In the case of *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, the court had before it the question as to whether a foreign corporation had the power to condemn a right of way across lands for the purpose of carrying water to its smelter. The condemnation was resisted by the land owner on the grounds that the corporation, being a foreign corporation, was denied ownership of lands under the constitution. The court sustained this contention, and on page 550, says:

"It is also contended by respondent that this is not such an ownership of land as is contemplated by the constitution, that the right of way sought to be condemned might be abandoned, and that the tenure of the corporation is uncertain; but it seems to us that under condemnation laws of the state, the substantial right to the land passes to the corporation; and, so far as duration is concerned, we held in *State ex rel. Winston v. Morrison*, 18 Wash. 664, 52 Pac. 228, that a lease for a term of 99 years was

void under the constitutional provision above referred to, and that it did not refer to absolute ownership; also, in *State ex rel. Winston v. Hudson Land Company,* 19 Wash. 85, 52 Pac. 574; 40 L. R. A. 430, that, under the constitutional provision prohibiting alien ownership of lands, a lease of lands to an alien for the period of 49 years was void; and that the constitutional provision would not be construed away to such an extent that aliens could become owners of land under any circumstances other than circumstances incorporated in the proviso in the constitution itself."

We think that these cases definitely settle this feature of the case, and leave nothing more that need be said. However, in the case of *Moeller v. Gormley,* 44 Wash. 465, it was held that a lease of real estate was an interest in land and that it should be assessed and taxed as real estate and not as personal property.

In the case of *Humphrey v. Krutz,* 77 Wash. 152, it was held that an easement in an alley, although an incorporeal right, is an interest in land, and that a suit may be maintained to quiet title thereto.

In the case of *Pioneer Sand & Gravel Co. v. Seattle C. & D. D. Co.,* 102 Wash. 608, it was held that an agreement between parties to purchase from the state certain lands, and that a certain 60-foot strip thereof should "be kept open and maintained by the parties as a waterway for the accommodation of vessels, boats and other water craft" created an easement in land and a covenant running with the land binding upon the successors in interest to the parties

to the contract. In this case the court considered the question of whether easements are appurtenant or in gross, and we here quote from the language of the court on that feature of the case, in view of the many cases cited by appellant in its brief for the purpose of showing that the interest which it acquired under the conveyances in question was an easement in gross and therefore not real estate or any interest therein. On page 618, the court says:

"The questions as to when covenants do or do not run with the land, and whether easements are appurtenant or in gross, were among the most abstruse and technical questions of the common law. And when one goes to the earlier cases, he meets confusion and conflict. Many of the old doctrines have since been expressly overruled; others seem to be ignored; and more and more equity has come to enforce covenants which technically do not run with the land.

"It is well settled in law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant."

In the case of *United States v. Welch*, 217 U. S. 333, this court considered whether it was necessary for the government in a proceeding to condemn land to pay the value of an easement for ingress and egress to and from private property. The court held that the government should pay for such a right of way and said, "a private right of way is an easement and is land."

In the case of *Western Union Telegraph Company v. Georgia R. & Banking Co.*, 227 Fed. 276, in the United States District Court of Georgia, the tele-

graph company brought an action to enjoin the railroad company from interfering with its telegraph lines on the right of way of the railroad company. The predecessors in interest of the telegraph company had been granted the right by the predecessors in interest of the railroad company to construct, maintain and operate its telegraph lines upon and along the right of way of the railroad company. The railroad company contended that an easement was only a license, and not a grant in perpetuity which would inure to the benefit of the successors in interest of the parties thereto. The court denied this contention and ruled that an easement was an interest in land which would pass to the successors in interest of the grantee, as appears from the following statement in the syllabus:

"An 'easement' such as for the construction and maintenance of a telegraph line on a railroad right of way, as distinguished from a pure or technical easement, is an interest in land, which confers upon its owner some right, benefit, dominion, or lawful use out of or over the estate of another, and is a species of incorporeal hereditament."

The case of *Sims ex rel. State Board of Tax Commissioners v. Fletcher Savings & Trust Company,* (Ind.) 142 N. E. 121, involved the construction of the tax statute of Indiana which permitted a deduction from the tax on the capital stock of banks of the value of such real estate as may be carried in the capital stock account. The bank held a 99-year lease on real estate, the value of which it claimed the

privilege of deducting from the valuation of the capital stock. The taxing officials claimed that the value of the lease should not be deducted because it is personal property and not real estate and should be taxed as personal property. The court held that the leasehold was an ownership in real estate and not personal property.

See also as to the nature of an easement for a right of way:

Goodrich v. Burbank, 12 Allen (Mass.) 459;
Wyatt v. Larimer & Weld Irrigation Co., (Colo.) 33 Pac. 144;
Cook v. C. B. & Q. Ry. Co., 40 Iowa 451;
Tidewater Pipe Company v. Bell, (Pa.) 124 Atl. 351.

On pages 30 to 36, inclusive, of its brief, appellant cites a number of cases for the purpose of showing that the rights in the property which it secured by the conveyances in question are easements in gross and not easements appurtenant, and are consequently only personal property, and as such not within the prohibition of the state constitution against alien ownership of land. It must be admitted that the supreme court of Washington has held in a number of cases that a lease of real estate is personal property, and while that is no doubt true, it does not militate against the position we take in this case and which is sustained by the authorities we have heretofore cited on this subject, that a lease is also an interest in real estate, and when the lease is for a long period of time it is, in fact, ownership of real estate. If a

lease for 49 years is ownership of real estate within the meaning of the state constitutional provision, certainly a perpetual and irrevocable easement and right of way to construct and maintain a power transmission line on real estate is likewise ownership of land within the meaning of that constitutional provision, as under it, as was said in *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, "the substantial right to the land passes to the corporation."

If, however, the case is to turn upon whether appellant's easements are appurtenant or in gross, and upon the existence of a dominant and servient estate, we submit that the mining property of appellant, to which all its easements lead, may be regarded as the dominant estate.

Of the three cases cited from the Washington supreme court on page 31 of appellant's brief, the first involved the right of a real estate broker to recover commission for the sale of a leasehold. The employment of the broker was not in writing, and the statute of fraud required that an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission must be in writing. The court held that the statute did not relate to the sale of personal property and that inasmuch as a lease is a chattel interest, it would not fall within the definition of "real estate" as used in the statute and that the broker would be entitled to recover his commission, although no written agreement had been made for the payment.

The second case involved an action for a broker to recover commission on the sale of a lease, good will and furniture of a rooming house. The broker was not licensed as required by the real estate brokers' act. The court construed a section of the act containing a very ambiguous definition of a real estate broker and decided that the definition did not include selling or offering to sell, or buying or offering to buy, a real estate lease. We see nothing in this case that has any bearing upon the question except possibly the statement that under previous decisions of the court, a leasehold interest is personal property, or a chattel real, and no lawyer, under the common law, could contend otherwise.

The third case cited involved the right of a broker who had procured for another an easement over land to continue so long as the right of way was used for hauling logs, to recover for services. The only question involved was whether the right of way secured was real estate within the meaning of the statute of frauds requiring an agreement authorizing and employing an agent or broker to sell or purchase real estate to be in writing. The court, on the authority of the first case cited on page 31 of appellant's brief, held that this right of way easement was not "real estate" within the meaning of the statute of frauds, and after quoting from that case said:

"If the purchase or sale of a leasehold, regardless of its term of years, is not a sale of real estate, then certainly, the purchase or sale of an easement which by its terms is limited 'to continue so long as

the right of way is used for hauling logs' is not a sale of real estate and is nothing but a chattel interest and is personal property."

We do not believe that these cases in any sense weaken the earlier decisions of the Washington supreme court to the effect that a lease for an unreasonable length of time and that an easement for a right of way across lands for the purpose of conducting water are ownership of lands within the meaning of the constitutional inhibition against alien ownership of lands. Certainly the rights obtained by appellant in the conveyances received by it, "all the substantial right to the land," are perpetual and irrevocable, and have all the attributes of ownership of the land.

CONCLUSION.

In conclusion, we submit that the district court had no jurisdiction in this case, because (1) the plaintiff (appellant here) had a plain, adequate and complete remedy at law, (2) the action is in effect one against the state, prohibited by the eleventh amendment, and, (3) no Federal question is presented in the issues that had not been already adversely determined to plaintiff's contentions, either expressly or by analogy; and further, that on the merits the declaration of the Washington constitution against ownership of land by aliens, or by a corporation of which the majority of its capital stock is owned by aliens, prohibits plaintiff from owning the rights of way for its power transmission line, and that this

constitutional inhibition does not interfere with any rights of plaintiff under the Commerce or Contract Clauses or any other provision of the Federal Constitution, and does not violate any rights accorded plaintiff under any treaty.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General,

JOHN A. HOMER,
Assistant Attorney General.

Attorneys for Appellees.

APPENDIX I.

1815

CONVENTION OF COMMERCE AND NAVIGATION

The United States of America and His Britannick Majesty being desirous, by a convention, to regulate the commerce and navigation between their respective countries, territories and people, in such a manner as to render the same reciprocally beneficial and satisfactory, have respectively named Plenipotentiaries, and given them full powers to treat of and conclude such convention, that is to say:

The President of the United States, by and with the advice and consent of the Senate thereof, hath appointed for their Plenipotentiaries John Quincy Adams, Henry Clay, and Albert Gallatin, Citizens of the United States; and His Royal Highness the Prince Regent acting in the name and on the behalf of His Majesty, has named for his Plenipotentiaries the Right Honourable Frederick John Robinson, Vice-President of the Committee of Privy Council for Trade and Plantations, Joint Paymaster of His Majesty's Forces, and a member of the Imperial Parliament, Henry Goulburn, Esquire, a member of the Imperial Parliament, and Under Secretary of State, and William Adams, Esquire, Doctor of Civil Laws:

And the said Plenipotentiaries, having mutually produced and shown their said full powers, and exchanged copies of the same, have agreed on and concluded the following articles, *vide licet*:

Article I.

There shall be between the territories of the United States of America, and all the territories of His Britannick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with

their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively.

ARTICLE II.

No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce or manufacture of His Britannick Majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of His Britannick Majesty in Europe of any articles the growth, produce or manufacture of the United States, than are or shall be payable on the like articles being the growth, produce or manufacture of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries, on the exportation of any articles to the United States, or to His Britannick Majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles the growth, produce or manufacture of the United States, or of His Britannick Majesty's territories in Europe, to or from the said territories of His Britannick Majesty in Europe, or to or from the said United States, which shall not equally extend to all other nations.

No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels

of the United States; nor in the ports of any of His Britannick Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels.

The same duties shall be paid on the importation into the United States of any articles the growth, produce or manufacture of His Britannick Majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of His Britannick Majesty's territories in Europe, of any article the growth, produce or manufacture of the United States, whether such importation shall be in British vessels or in vessels of the United States.

The same duties shall be paid, and the same bounties allowed, on the exportation of any articles the growth, produce or manufacture of His Britannick Majesty's territories in Europe to the United States, whether such exportation shall be in vessels of the United States or in British vessels; and the same duties shall be paid, and the same bounties allowed, on the exportation of any articles the growth, produce or manufacture of the United States, to His Britannick Majesty's territories in Europe, whether such exportation shall be in British vessels or in vessels of the United States.

It is further agreed that in all cases where drawbacks are or may be allowed upon the re-exportation of any goods the growth, produce or manufacture of either country, respectively, the amount of the said drawbacks shall be the same, whether the said goods shall have been originally imported in a British or an American vessel; but when such re-exportation shall take place from the United States in a British vessel, or from the territories of His Britannick Majesty in Europe in an American vessel, to any other foreign nation, the two contracting parties reserve to themselves, respectively, the right of

regulating or diminishing, in such case, the amount of the said drawback.

The intercourse between the United States and his Britannick Majesty's possessions in the West Indies, and on the continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse.

ARTICLE III.

His Brittanick Majesty agrees that the vessels of the United States of America shall be admitted and hospitably received at the principal settlements of the British dominions in the East Indies, *vide licit*: Calcutta, Madras, Bombay, and Prince of Wales' Island; and that the citizens of the said United States may freely carry on trade between the said principal settlements and the said United States, in all articles of which the importation and exportation, respectively, to and from the said territories, shall not be entirely prohibited; provided only, that it shall not be lawful for them, in any time of war between the British Government and any State or Power whatever, to export from the said territories, without the special permission of the British Government, any military stores, or naval stores, or rice. The citizens of the United States shall pay for their vessels, when admitted, no higher or other duty or charge than shall be payable on the vessels of the most favor'd European nations, and they shall pay no higher or other duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in the vessels of the most favored European nations.

But is it expressly agreed that the vessels of the United States shall not carry any articles from the said principal settlements to any port or place, except to some

port or place in the United States of America, where the same shall be unladen.

It is also understood that the permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories; but the vessels of the United States having, in the first instance, proceeded to one of the said principal settlements of the British Dominions in the East Indies, and then going with their original cargoes, or part thereof, from one of the said principal settlements to another, shall not be considered as carrying on the coasting trade. The vessels of the United States may also touch for refreshment, but not for commerce, in the course of their voyage to or from the British territories in India, or to or from the dominions of the Emperor of China, at the Cape of Good Hope, the island of St. Helena, or such other places as may be in the possession of Great Britain, in the African or Indian seas; it being well understood that in all that regards this article the citizens of the United States shall be subject, in all respects, to the laws and regulations of the British government from time to time established.

ARTICLE IV.

It shall be free for each of the two contracting parties respectively to appoint Consuls for the protection of trade, to reside in the dominions and territories of the other party; but before any Consul shall act as such, he shall, in the usual form, be approved and admitted by the Government to which he is sent; and it is hereby declared that, in case of illegal or improper conduct towards the laws or Government of the country to which he is sent, such Consul may either be punished according to law, if the laws will reach the case, or be sent back, the offended Government assigning to the other the reasons for the same.

It is hereby declared that either of the contracting parties may except from the residence of Consuls such particular places as such party shall judge fit to be so excepted.

ARTICLE V.

This convention, when the same shall have been duly ratified by the President of the United States, by and with the advice and consent of their Senate, and by His Britannick Majesty, and the respective ratifications mutually exchanged, shall be binding and obligatory on the said United States and His Majesty for four years from the date of its signature; and the ratifications shall be exchanged in six months from this time, or sooner if possible.

Done at London this third day of July, in the year of our Lord one thousand eight hundred and fifteen.

[SEAL]	JOHN QUINCY ADAMS,
[SEAL]	H. CLAY,
[SEAL]	ALBERT GALLATIN,
[SEAL]	FREDERICK JOHN ROBINSON,
[SEAL]	HENRY GOULBURN,
[SEAL]	WILLIAM ADAMS.

1827

COMMERCIAL CONVENTION

The United States of America, and His Majesty the King of the United Kingdom of Great Britain and Ireland, being desirous of continuing in force the existing commercial regulations between the two Countries, which are contained in the Convention concluded between Them on the Third of July, 1815, and further renewed by the Fourth Article of the Convention of the Twentieth of October, 1818,—have, for that purpose, named Their respective Plenipotentiaries, that is to say:

The President of the United States of America, Al-

bert Gallatin, their Envoy Extraordinary and Minister Plenipotentiary to His Britannick Majesty:

And His Majesty the King of the United Kingdom of Great Britain and Ireland, The Right Honourable Charles Grant, a Member of His said Majesty's Most Honourable Privy Council, a Member of Parliament, and Vice President of the Committee of Privy Council for Affairs of Trade and Foreign Plantations; and Henry Unwin Addington, Esquire:

Who, after having communicated to each other their respective Full Powers, found to be in due and proper form, have agreed upon and concluded the following Articles:

ARTICLE I.

All the Provisions of the Convention concluded between the United States of America, and His Majesty The King of the United Kingdom of Great Britain and Ireland, on the Third of July, 1815, and further continued for the term of ten years by the fourth Article of the Convention of the Twentieth of October, 1818, with the exception therein contained, as to St. Helena, are hereby further indefinitely, and without the said exception, extended and continued in force, from the date of the expiration of the said ten Years, in the same manner as if all the Provisions of the said Convention of the Third of July 1815, were herein specifically recited.

ARTICLE II.

It shall be competent, however, to either of the Contracting Parties, in case either should think fit, at any time after the expiration of the said ten years,—that is, after the Twentieth of October, 1828,—on giving due notice of twelve months to the other Contracting Party, to annul and abrogate this Convention:—and it shall, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

ARTICLE III.

The present Convention shall be ratified, and the Ratifications shall be exchanged in Nine Months, or sooner if possible.

In Witness whereof, the respective Plenipotentiaries have signed the same, and have affixed thereto the Seals of their Arms.

Done at London the Sixth day of August, in the Year of Our Lord One Thousand Eight Hundred and Twenty-Seven.

[SEAL] ALBERT GALLATIN,
[SEAL] CHA. GRANT,
[SEAL] HENRY UNWIN ADDINGTON.

Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909, Malloy, Volume I, Pages 624 and 645.

SUPREME COURT OF THE UNITED STATES.

No. 66.—October Term, 1930.

Northport Power and Light Company, Appellant, *vs.* Roland H. Hartley, Governor of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington.	Appeal from the District Court of the United States for the Western District of Washington.

[May 25, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity to enjoin the appellees from bringing or causing to be brought a suit for enforcing against the appellant Section 33, Article II of the Constitution of the State of Washington and an Act of 1921 in pursuance of the same, it being alleged that the Section and Act are repugnant to the commerce and contract clauses of the Constitution of the United States and also to the Fourteenth Amendment and to the Treaty between the United States and Great Britain. The bill was dismissed by a District Court of three Judges. 35 F. (2d) 199.

The bill alleges that the plaintiff, the appellant, is a corporation of the State of Washington and that it owns rights of way, &c., over which it transmits electrical energy from Canada to points within the State. But the majority of its stock is owned by an alien corporation and, with immaterial exceptions, Section 33, Art. II of the Constitution of the State prohibits the ownership of land by aliens and provides that every corporation of which the majority of the stock is owned by aliens shall be considered an alien for the purposes of the prohibition. This was in force before the appellant acquired its alleged rights. The statute was passed after the acquisition. *State* v. *Natsuhara*, 136 Wash. 437, 444. It is alleged that the defendants have threatened and will attempt to forfeit and escheat to the State the plaintiff's rights by

prosecuting a suit at law in the Courts of the State as a result of which the plaintiffs will suffer irreparable loss.

Some, at least, of the constitutional objections to the laws of the State are disposed of by *Terrace* v. *Thompson*, 263 U. S. 197, but before they are reached there arises the objection that no ground for equitable interference by the Courts of the United States is shown by the bill. The only injury alleged is the result of the suit in the State Courts. So far as appears that result will ensue only upon a decision against the appellant. It is an odd ground for an injunction against a suit that the suit may turn out against the party sued. If the action is based upon an unconstitutional law and if the trial Court upholds it, still the appellant can protect its rights as fully in the State Courts as elsewhere. As it is put by Mr. Justice Moody speaking for a unanimous Court, "It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction." *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285. *Cavanaugh* v. *Looney*, 248 U. S. 453, 456. These cases relied on by the Court below are sufficient to sustain its conclusion. The exceptions are explained in the cases in which they occur, e. g., *Terrace* v. *Thompson*, 263 U. S. 197, 215, 216.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END OF CASE